SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 786

BURNS MORTGAGE COMPANY, INC., PETITIONER,

vs.

ERWIN M. FRIED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DECEMBER TERM, 1931

16688

BURNS MORTGAGE COMPANY, INC.,

vs.

ERWIN M. FRIED

Blanc and Steinberg, Esqs. William H. Schneller.

DOCKET ENTRIES

Feb. 1, 1932. Præcipe to issue summons filed.
Feb. 1, 1932. Summons exit—returnable 1st Monday in March, 1932.
Feb. 1, 1932. Statement of claim and notice to file affidavit of defense filed.
Feb. 4, 1932. Summons returned—"on February 2, served," and filed.
Feb. 17, 1932. Appearance of W. H. Schneller, Esq., for defendant, filed.
Feb. 17, 1932. Affidavit of defense raising questions of law filed.
Apr. 25, 1932. Argued sur affidavit of defense raising questions of law.
May 16, 1932. Opinion, Dickinson, J., ruling in favor of defendant filed.
Oct. 5, 1932. Argued sur motion for re-argument.

[fol. 2]

Oct. 10, 1932. Opinion, Dickinson, J., denying motion for re-argument, filed.
Oct. 28, 1932. Judgment of non pros. with costs to defendant filed.
Nov. 15, 1932. Order of Court allowing exception filed.
Nov. 15, 1932. Assignments of Error filed.
Nov. 15, 1932. Petition for appeal filed.
Nov. 15, 1932. Order of Court granting appeal filed.

Nov. 15, 1932. Præcipe for transcript of record sur appeal filed.
Jan. 4, 1933. Bond sur appeal, with National Surety Company, surety, in $200, and decree approving same filed.
Jan. 4, 1933. Copy of Notice of Appeal filed.
Jan. 4, 1933. Citation allowed and issued.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

PLAINTIFF'S STATEMENT OF CLAIM IN ASSUMPSIT—Filed Feb. 1, 1932

The plaintiff Burns Mortgage Company, Inc., a corporation, claims of Erwin M. Fried, the defendant above named, [fol. 3] the sum of $6000.00 with interest at the rate of seven per cent (7%) per annum from August 28, 1925, which sum is justly due and payable by the defendant to the plaintiff upon a cause of action whereof the following is a statement:

1. The plaintiff, Burns Mortgage Company, Inc., is a corporation organized and existing under the laws of the State of Florida.

2. The defendant, Erwin M. Fried, is a resident of Allentown, Lehigh County, and is a citizen of the State of Pennsylvania.

3. The amount claimed by the plaintiff in this action exceeds the sum of $3000.00 exclusive of interest and costs.

4. On or about August 28, 1925 at Miami, Florida, the defendant Erwin M. Fried, for valuable consideration made, executed and delivered to Golden Isles Corporation his six promissory notes for $1000.00 each, one promissory note payable on or before February 28, 1926, one promissory note payable on or before August 28, 1926, one promissory note payable on or before February 28, 1927, one promissory note payable on or before August 28, 1927, one promissory note payable on or before February 28,

1928 and one promissory note payable on or before August 28, 1928, respectively. True and correct copies of the said notes are attached hereto, made part hereof and marked Exhibits "A," "B," "C," "D," "E" and "F."

5. Prior to the maturity of each of the aforesaid notes, the payee thereof, Golden Isles Corporation, acting by S. A. Kagey, its President and duly authorized agent, for value duly endorsed, transferred and delivered the said [fol. 4] notes to Walter Williamson who thereupon became the holder thereof in due course, without notice of any infirmity in the said notes or any defect in the title thereto.

6. Upon the respective maturity dates of the said promissory notes, to wit, March 1, 1926 (February 28, 1926 being Sunday), August 28, 1926, February 28, 1927, August 29, 1927 (August 28, 1927 being Sunday), February 28, 1928 and August 28, 1928, respectively, the aforesaid notes were duly presented for payment at 235 East Flagler Street, Miami, Florida, the place designated thereon for payment, but payment of the said notes was refused.

7. After maturity of each of the said notes, Walter Williamson, for value, duly transferred and delivered each of the aforesaid notes to the plaintiff, Burns Mortgage Company, Inc., a corporation, which thereupon became the holder thereof in due course, without notice of any infirmity in the said notes or any defect in the title thereto.

8. That by Sec. 6936 of the Compiled General Laws of Florida, entitled "Rate of Interest" it is provided that in all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 8 per cent per annum, but parties may contract for a less or greater rate by contract in writing; that by Sec. 6937 thereof, entitled "Usurious Contracts Defined," all contracts for the payment of interest upon loan, advance of money, or forebearance to enforce the collection of any debt or upon any contract whatever at a higher rate of interest than 10 per cent per annum are declared usurious; that the aforesaid laws [fol. 5] at all the times herein mentioned were and now are in full force and effect.

9. Although payment has frequently been demanded from the defendant, the defendant has failed and refused and still refuses to pay the principal or interest of the said notes, or any part thereof.

10. Wherefore, the plaintiff claims of the defendant the sum of $6000.00 with interest as aforesaid, which sum is justly due and payable.

Blanc and Steinberg, Attorneys for Plaintiff, by Sigmund H. Steinberg.

Duly sworn to by P. V. Burns. Jurat omitted in printing.

[fol. 6] EXHIBIT "A" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or after February 28, 1926 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida; with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 1.

(Sgd.) Erwin M. Fried. (Seal). —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by J. H. Heeny, Treas. Without Recourse. Golden Isles Corporation, by S. A. Kagey.

[fol. 7] EXHIBIT "B" STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, Aug. 28, 1925.

On or before August 28, 1926 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Com-

pany, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 2.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 8] EXHIBIT "C" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before February 28, 1927 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 3.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 9] EXHIBIT "D" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before August 28, 1927 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 4.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 10] EXHIBIT "E" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before February 28, 1928 after date for value received I promise to pay to the Golden Isles Corporation One Thousand Dollars at the offices of the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred inter-

est payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 5.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 11] EXHIBIT "F" TO STATEMENT OF CLAIM

Golden Isles Corporation, Miami, Florida

$1000.00 Miami, Florida, August 28, 1925.

On or before August 28, 1928 after date for value received I promise to pay to the order of Golden Isles Corporation One Thousand Dollars at the offices at the Company, 235 East Flagler Street, Miami, Florida, with interest thereon at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually.

Due —.

No. 6.

(Sgd.) Erwin M. Fried. (Seal.) —— ——. (Seal.)

Endorsement: Without Recourse. Golden Isles Corporation, by S. A. Kagey, Pres.

[fol. 12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE RAISING QUESTIONS OF LAW—Filed Feb. 17, 1932

Erwin M. Fried, defendant above named, although alleging that he has a full, just and legal defense to all of said

plaintiff's claim, and further alleging that he is not indebted to the Burns Mortgage Company, Inc., plaintiff above named, in the sum of Six Thousand Dollars ($6,000.00), with interest at the rate of seven (7) per cent per annum from August 28, 1925, or any sum whatsoever, upon a cause of action as set forth in said plaintiff's statement of claim, or any sum whatsoever upon any cause of action whatsoever, without answering the averments of facts set forth in said Statement of Claim, the defendant having been advised, believes and, therefore, avers that the said Statement of Claim filed in the above entitled case is insufficient at law, and is generally vague, indefinite, uncertain, informal and insufficient to support the action upon the alleged averments contained therein for the following reasons:

1. The statement of claim, filed by the above named plaintiff, and the matters therein contained, do not set forth a good cause of action.

2. The notes referred to in Paragraph 4 of the plaintiff's statement of claim are not negotiable instruments.

3. An examination of the plaintiff's statement of claim, as well as the notes therein referred to, will reveal that there has not been a proper assignment of said notes.

4. That the suit is improperly brought, in that, if there should be any merit to the plaintiff's claim, which is denied [fol. 13] by the defendant, the suit should be in the name of the payee, to the plaintiff's use.

5. Our negotiable instruments' law of May 16, 1901, P. L. 194 (which, so far as appears, is exactly the same as that of Florida, where the notes were made payable), provides in section 1, that:

"An instrument to be negotiable * * * must contain an unconditional promise or order to pay a sum certain in money";

and, in section 2:

"The sum payable is a sum certain, within the meaning of this Act, although it is to be paid: (1) With interest * * *"

Taken together these provisions mean that if a note provides for the payment of the principal sum and interest, it must clearly appear from the note itself, that at any given date the two will always aggregate "a sum certain"; otherwise, though the note might be for *a* "sum certain" so far as concerns the principal, it might be uncertain as to interest, or vice versa, notwithstanding that the statute declares it must always "contain an unconditional promise to pay a sum certain".

6. An examination of the notes set forth in the plaintiff's statement of claim will reveal that in the first sentence, the notes say the principal is payable "with interest thereon at the rate of seven per cent per annum from date until fully paid", which must mean whether before or after maturity. The last sentence says: "Deferred interest payments to bear interest from maturity at 10 percent per annum, semi-annually." "Deferred payments * * * from maturity" can only refer to all sums which the notes [fol. 14] say are to mature in the future, that is, postponed payments. The notes in question have two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear seven (7) per cent interest until fully paid, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity. The said notes do not contain in order to be negotiable "an unconditional promise * * * to pay a sum certain".

7. An examination of the notes set forth in the plaintiff's statement of claim reveals that they contain the following provision: "And in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection."

Wherefore, the said defendant prays that judgment be entered in his favor, and that the said plaintiff may be barred from having or maintaining his said action against him. If the Court, however, should decide the questions of law herein raised against the defendant, then he prays leave to file a supplemental affidavit of defense to the aver-

ments of fact set forth in the plaintiff's statement of claim, within fifteen (15) days.

(Sgd.) Erwin M. Fried. Wm. H. Schneller, Attorney for Erwin M. Fried.

Duly sworn to by Erwin M. Fried. Jurat omitted in printing.

[fol. 15] In United States District Court

Opinion Sur Statutory Demurrer—Filed May 16, 1932

Dickinson, J.:

The defendant has interposed to the claim of the plaintiff an affidavit of defense raising questions of law. Among them is one raising the question of the right of the plaintiff to sue in its own name. The plaintiff acquired no title to the notes in suit until after maturity and dishonor. It is in consequence not an endorsee but an assignee. It is, however, a holder. Pennsylvania has always observed the distinction between one in whom is the right of action and one who has the right to the fruits of a recovery in the action brought. It has further always adhered to the rule that the action must be brought in the name of the former as legal plaintiff, permitting it however to be brought to the use of the beneficial owner. To this rule there are however exceptions. One is statutory. There is, for instance, [fol. 16] a Pennsylvania Statute which gives to the assignee of a bond the right to sue in his own name qua assignee. This is often used as an illustration of the rule referred to and affords a good one. The Statute prescribes how such assignments shall be made. The law recognizes the title of an assignee, the assignment to whom is irregular in that it does not conform to the requirements of the Statute but distinguishes it from the title conferred by an assignment which does so conform. The former is termed an equitable; the latter a legal assignment. The latter may sue in his own name qua assignee but the former must sue in the name of the obligee to use &c.

The law merchant supplies us with another exception to the cited rule. One to whom negotiable paper has been passed in due course by endorsement before maturity sue-

ceeds to all the rights of the payee as fully as if the promise had been made to such endorsee and in consequence may sue in his own name. After dishonor the law merchant is no longer applicable, and those who take dishonored paper take what they get, not under the law merchant but under the law of contracts.

It would be interesting to trace the effects of this upon the right of the holder to sue and the distinctions drawn between actions by endorsee against endorser and by holder against maker.

The conclusion we have reached however makes any such inquiry unprofitable. The question is a purely procedural one, and it is of no very great real importance whether the owner of a cause of action asserts a right of action thereon in his own name as legal plaintiff or in the name of the [fol. 17] original owner to the use of the succeeding owner. The common law in its adherence to logically developed processes requires a legal right to be enforced in the name of the legal plaintiff. Equity in its adoption of more plastic processes ignores parties plaintiff and defendant and knows only parties treating as such those who have the real beneficial ownership of the cause of action indifferent to those who no longer have concern with it. In some jurisdictions one system is followed; in others the other. The really important thing is to be able to know which rule to follow.

It has been urged upon us that the Pennsylvania rule has been settled for us by the Negotiable Instruments Act. The Act distinguishes, it is said, between "holders" and "holders in due course", giving to either the right to sue in his own name as legal plaintiff. However this may be, the Courts of Pennsylvania have ruled that the "holder" of negotiable paper, whether he acquired title before or after dishonor, may sue in his own name as legal plaintiff or in the name of a former holder to his use.

In Henratty vs. Dougherty, 71 Pa. (Sup.), 248, the suit was brought in the name of the payee to the use of a holder after dishonor. A point was submitted and refused that the suit should have been by the holder. The judgment was affirmed. The opinion, however, arguendo laid down the doctrine that such a holder might sue in his own name but was not bound to do so.

We accept this opinion although obiter as an authoritative statement of the law of Pennsylvania as applied to

holders of negotiable paper. Following it we hold that a "holder" after dishonor may sue either in his own name [fol. 18] as legal plaintiff or to his use. The present action is in this respect properly brought.

This takes us to the second question raised. It is that of the negotiable character of the note in suit. The denial is based upon the uncertainty of the sum of money promised to be paid. The note is a promise to pay a named sum, with interest, until fully paid. This is an unconditional promise to pay a sum certain. There is a further promise however to pay the interest semi-annually. One of the notes matures in six months and the other in a year. A third promise is "deferred interest payments to bear interest from maturity" at a rate greater than that which the principal debt carries. One to whom the note was offered in due course (if taken after an interest period had passed) could not from the face of the paper tell how much was payable at the maturity of the note, nor if payment was deferred how much he would ultimately recover. It has been held in Pennsylvania that this feature destroys the negotiability of the note.

Bank vs. Bosler, 297 Pa. 353.

The plaintiff seeks to differentiate Bank vs. Bosler from the instant case because of the fact circumstance that there the "debt" bore different interest rates, and here the principal debt bore one rate and the deferred interest payment another rate, and failing this questions the authority of the cited case on the strength of

Bank of Sutton, 52 Fed. Rep. 192, and
Jocknus vs. Claussen, 47 (2nd) Fed. Rep. 766.

There is also reference made to the case of New vs. Edley, which we assume to be as yet unreported, but the [fol. 19] quoted excerpts from which we accept as accurate.

We cannot withhold the comment that the criticisms of Bank vs. Bosler are based upon a misconception of what that case rules. It is of the very genius of the law merchant that negotiable paper may be taken at its face value, so that it may form part of and a very important part of the circulating medium of exchange. It is because of this that negotiable paper is termed an "instrument". It is emphatically an instrument of commerce. There should

in consequence be no more doubt of what is to be received at the maturity of a note than there is about a National Bank note. Take a note which calls for a payment of interest before the maturity of the note. Assume it to be negotiated in due course after the interest payment period but before the maturity of the note. What must the maker pay the holder? Is the interest taken to have been paid or not? If the maker has paid the interest to the payee must he pay the holder notwithstanding? If interest is not paid according to the tenor of the note has the note been dishonored and the holder take it subject to all the equities? Is such a note negotiable before the interest due date but not thereafter? If the note is not paid at maturity, what sum is to be paid?. It is idle to say there is any certainty in such an obligation, having in mind that the test of certainty is not what a court may ultimately decide to be payable but what the note on its face discloses.

The conclusion reached is that the obligation in suit is not negotiable. It follows from this that under the procedural law of Pennsylvania there is in the plaintiff no right of action. We accordingly rule that the questions [fol. 20] discussed are answered favorably to the defendant.

1. The obligations sued upon are not negotiable instruments under the law merchant or the Negotiable Instruments Act.

2. The statement of claim discloses no legal right of action in the plaintiff.

An appropriate order may be submitted. For such guidance as it may be to the plaintiff we add leave to amend.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR RE-ARGUMENT—Filed Oct. 10, 1932

DICKINSON, J.:

There are in this case two questions. One is a question of substantive law and the other procedural. At least in form the question before us is wholly and purely proced-

ural. The case being a Pennsylvania case the procedural law of Pennsylvania controls. The case as before ruled was upon the following propositions:

1. If the case is one of the law merchant, as it is if the instrument sued upon is what is called negotiable, the suit may be brought either in the name of the holder of the negotiable instrument or in the name of the payee to his use.

2. If, however, the case is controlled by the ordinary law of contracts, or in other words, if the instrument in suit is not negotiable, then the action must be brought in the name of the one with whom the contract is made as legal plaintiff to the use of any assignee of the contract.

[fol. 21] 3. The question of whether the case comes under the law merchant or the law contract is determined by the other question of whether the instrument sued upon is negotiable.

4. This latter is a question of substantive law but its determination determines likewise the procedural question.

It is thus clear that what may be called the formal question is a procedural one. The real question is one of substantive law in the sense that what is the substantive law determines the procedure. There is much force in the argument presented to us that the question of substantive law is to be determined by the law of the place of the contract. Even if this be true the procedural question is to be determined by the law of the forum. There is back of it all the practical situation that it is of no real importance whether the suit be brought in the name of B. as legal plaintiff or whether it is brought in the name of A. as legal plaintiff to the use of B. So far as practical results are involved, the procedural question might well be ignored and the question of substantive law determined as a trial question. The difficulty in accepting this practical view is that the Courts of Pennsylvania have always enforced the procedural view and required that action should be brought in the name of the legal plaintiff and by no one else. It is true that this controls a determination of what is the substantive law in determining what is the procedural law. We see, however, no escape from this situation. It is the very situation which was presented in the Bosler

case, 297 Pa. 353. There a suit was brought upon an instrument and was properly brought if the instrument was [fol. 22] negotiable, otherwise the wrong party had been made the legal plaintiff. The Court in that case determined that the instrument was not negotiable and hence the suit had been improperly brought. The case was therefore determined as one of procedure but it was determined in accordance with what was found to be the substantive law in that the instrument was held not to be negotiable and hence the suit improperly brought.

We feel bound to follow the doctrine of this case as one upon all fours with the instant case in its procedural features. It is not on all fours with the instant case upon the question of whether or not the instrument here sued upon is negotiable. The basic principle upon this question is one of policy. In order that those dealing with negotiable instruments may deal with them with confidence, such instruments must be taken at their face value, and there must be certainty in respect to what this face value is. Where there is a promise to pay a sum certain at a given date, any one is protected in accepting the instrument before maturity at its face value, even if in fact it has been paid in whole or in part before maturity, if the endorsee is innocently ignorant of the payment. It is difficult to follow the thought of certainty in the promise of this instrument because there are really two promises. One is to pay the interest on the obligation at the end of six months from date. The other is to pay the principal at the end of three years. The first promise matured at the end of the six months' period and if not kept the instrument was dishonored. The other obligation is not dishonored by non-payment until a later date and an endorsee of both promises takes the one after dishonor and the other before it. This [fol. 23] means that he is an innocent holder for value of one obligation before maturity but is not such innocent holder of the other obligation. How can there under this situation be said to be any certainty?

We adhere to the view before expressed that this Court should follow the doctrine of the Bosler case, and the motion for a re-argument is denied.

An appropriate order may be entered in accordance with the opinion before handed down.

IN UNITED STATES DISTRICT COURT

DECREE ENTERING NON PROS.—Filed Oct. 28, 1932

And now, to wit, this twenty-eighth day of October, 1932, upon consideration of the pleadings, and after argument, and pursuant to opinion Sur Statutory Demurrer filed May 16, 1932, and opinion Sur Motion for Reargument filed October 10, 1932, the plaintiff having declined to avail itself of the leave granted to amend, it is

Ordered, Adjudged and Decreed that the question of law raised in the affidavit of defense filed, to wit, that the assignee of the obligation sued upon cannot maintain an action in its own name and right is decided in favor of the defendant; and it is further ordered that the said action as brought has abated, and a judgment of non pros. in favor of the defendant and against the plaintiff is entered, with costs to the defendant.

By the Court.

Dickinson, J.

[fol. 24] IN UNITED STATES DISTRICT COURT

EXCEPTION OF PLAINTIFF TO DECREE OF NON PROS.—Filed Nov. 14, 1932

And Now, to wit, this 14th day of November, 1932, on motion of Blanc and Steinberg, Esqs., attorneys for the plaintiff, an exception is allowed to the Decree of this Court, dated the 28th day of October, 1932, entering a judgment of non pros. against the plaintiff.

Dickinson, D. J.

IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFF FOR APPEAL—Filed Nov. 15, 1932

To the Honorable Oliver B. Dickinson, District Judge:

The above-named Burns Mortgage Company, Inc., feeling aggrieved by the decree and judgment of non pros. rendered and entered in the above-entitled case on the 28th

day of October, 1932, does hereby appeal from said decree to the Circuit Court of Appeals for the Third Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under rules of such Court in such cases made and provided;

[fol. 25] And your petitioner further prays that the proper order relating to the required security to be required of it be made;

And your petitioner will ever pray, etc.

Burns Mortgage Company, Inc., by P. V. Burns, President.

Duly sworn to by P. V. Burns. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Nov. 15, 1932

And now, to wit, this 14th day of November, 1932, the prayer of the foregoing petition for appeal is allowed. Security shall be entered in the sum of Two Hundred Dollars ($200.00).

By the Court.

Dickinson, D. J.

[fol. 26] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Nov. 15, 1932

Plaintiff, Burns Mortgage Company, Inc., by its attorneys, Blanc and Steinberg, Esqs., assigns the following errors in support of its Petition for Appeal from the District Court of the United States for the Eastern District of Pennsylvania to the Circuit Court of Appeals for the Third Circuit:

1. The learned Judge of the District Court erred in entering the following Decree on October 28, 1932, entering a judgment of non pros. against the plaintiff:

"Decree

And now, to wit, this twenty-eighth day of October, 1932, upon consideration of the pleadings, and after argument, and pursuant to opinion Sur Statutory Demurrer filed May 16, 1932, and opinion Sur Motion for Reargument filed October 10, 1932, the plaintiff having declined to avail itself of the leave granted to amend, it is

Ordered, Adjudged and Decreed that the question of law raised in the affidavit of defence filed, to wit, that the assignee of the obligation sued upon cannot maintain an action in its own name and right is decided in favor of the defendant; and it is further ordered that the said action as brought has abated, and a judgment of non pros. in favor of the defendant and against the plaintiff is entered, with costs to the defendant.

By the Court.

Dickinson, J."

[fol. 27] The Exception taken to the foregoing Decree is as follows:

"Exception of Plaintiff to Decree of Non Pros.

And now, to-wit, this 14th day of November, 1932, on motion of Blanc and Steinberg, Esqs., attorneys for the plaintiff, an exception is allowed to the Decree of this Court, dated the 28th day of October, 1932, entering a judgment of non pros. against the plaintiff.

Dickinson, D. J."

2. The learned Judge of the District Court erred in making the following findings of law in the Opinion filed in the above-entitled case on May 16, 1932:

(a) "The plaintiff acquired no title to the notes in suit until after maturity and dishonor. It is in consequence not an endorsee but an assignee. It is, however, a holder."

(b) "After dishonor the law merchant is no longer applicable, and those who take dishonored paper take what they get, not under the law merchant but under the law of contracts."

(c) "One to whom the note was offered in due course (if taken after an interest period had passed) could not from

the face of the paper tell how much was payable at the maturity of the note, nor if payment was deferred how much he would ultimately recover. It has been held in Pennsylvania that this feature destroys the negotiability of the note. Bank vs. Bosler, 297 Pa. 353."

[fol. 28] (d) "There should in consequence be no more doubt of what is to be received at the maturity of a note than there is about a National Bank Note. Take a note which calls for a payment of interest before the maturity of the note. * * * It is idle to say there is any certainty in such an obligation, having in mind that the test of certainty is not what a Court may ultimately decide to be payable but what the note on its face discloses."

(e) "The conclusion reached is that the obligation in suit is not negotiable. It follows from this that under the procedural law of Pennsylvania there is in the plaintiff no right of action. We accordingly rule that the questions discussed are answered favorably to the defendant."

(f) "1. The obligations sued upon are not negotiable instruments under the law merchant or the Negotiable Instruments Act."

(g) "2. The statement of claim discloses no legal right of action in the plaintiff."

3. The learned Judge of the District Court erred in making the following findings of law in the Opinion filed in the above-entitled case on October 10, 1932:

(h) "2. If, however, the case is controlled by the ordinary law of contracts, or in other words, if the instrument in suit is not negotiable, then the action must be brought in the name of the one with whom the contract is made as legal plaintiff to the use of any assignee of the contract."

(i) "It is thus clear that what may be called the formal question is a procedural one. The real question is one of [fol. 29] substantive law in the sense that what is the substantive law determines the procedure. There is much force in the argument presented to us that the question of substantive law is to be determined by the law of the place of the contract. Even if this be true the procedural question is to be determined by the law of the forum. There is back of it all the practical situation that it is of no real

importance whether the suit be brought in the name of B. as legal plaintiff or whether it is brought in the name of A. as legal plaintiff to the use of B. So far as practical results are involved, the procedural question might well be ignored and the question of substantive law determined as a trial question. The difficulty in accepting this practical view is that the Courts of Pennsylvania have always enforced the procedural view and required that action should be brought in the name of the legal plaintiff and by no one else. It is true that this controls a determination of what is the substantive law in determining what is the procedural law. We see, however, no escape from this situation. It is the very situation which was presented in the Bosler case, 297 Pa. 353."

(j) "It is difficult to follow the thought of certainty in the promise of this instrument because there are really two promises. One is to pay the interest on the obligation at the end of six months from date. The other is to pay the principal at the end of three years. The first promise matured at the end of the six months' period and if not kept [fol. 30] the instrument was dishonored. The other obligation is not dishonored by non-payment until a later date and an endorsee of both promises takes the one after dishonor and the other before it. This means that he is an innocent holder for value of one obligation before maturity but is not such innocent holder of the other obligation. How can there under this situation be said to be any certainty?"

(k) "We adhere to the view before expressed that this Court should follow the doctrine of the Bosler case, and the motion for a re-argument is denied."

Blanc and Steinberg, by Sigmund H. Steinberg, Attorneys for Burns Mortgage Company, Inc.

In United States District Court

Præcipe for Record—Filed Nov. 15, 1932

To the Clerk:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals pursuant to an appeal filed in the above-entitled proceedings, and to include in such transcript the following:

(1) Docket Entries;
(2) Plaintiff's Statement of Claim;
(3) Affidavit of Defense raising Questions of Law;
(4) Opinion by Dickinson, J., sur Statutory Demurrer, filed May 16, 1932;
[fols. 31 & 32] (5) Opinion by Dickinson, J., sur Motion for Reargument, filed October 10, 1932;
(6) Decree entering a non pros., filed October 28, 1932;
(7) Order of Court allowing Exception to said Decree, filed on November 14, 1932;
(8) Petition of Plaintiff for appeal;
(9) Order allowing appeal;
(10) Assignments of Error;
(11) Præcipe for Record on appeal.

Blanc and Steinberg, by Sigmund H. Steinberg, Attorneys for Burns Mortgage Company, Inc., Plaintiff-Appellant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] Minute entry of argument and submission, April 14, 1933, omitted in printing.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5086

BURNS MORTGAGE COMPANY, INC., Plaintiff-Appellant,

v.

ERWIN M. FRIED, Defendant-Appellee

Upon Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed September 19, 1933

Before Buffington, Davis, and Thompson, Circuit Judges

THOMPSON, Circuit Judge:

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The Burns

Mortgage Company, Inc., as holder, brought an action in assumpsit upon six promissory notes against Erwin M. Fried, the maker. The notes were executed and delivered in Florida. Each contained the following provisions:

"With interest thereon (the principal sum) at the rate of 7 per cent per annum from date until fully paid. Inter- [fol. 35] est payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

The statement of claim averred that the payee, the Golden Isles Corporation, endorsed and delivered the notes before maturity to one Williamson. Payment was refused at maturity. Thereafter Williamson endorsed and delivered the notes to the Burns Mortgage Company, Inc. In an affidavit of defense raising questions of law, the defendant averred that the notes were not negotiable instruments and that the suit was therefore improperly brought in the name of the Burns Mortgage Company, Inc., as plaintiff, but should have been brought in the name of the payee, the Golden Isles Corporation, to the use of the assignee, the Burns Mortgage Company, Inc. The District Court gave the plaintiff an opportunity to amend but, after this privilege was refused, a judgment of non pros. was entered.

The ultimate question for decision on appeal is a procedural one: whether the Burns Mortgage Company, Inc., was entitled to bring suit in its own name as plaintiff.

The primary question is whether the notes are negotiable since, if they are, suit may be instituted by the holder in its own name. The appellant contends that the negotiability of the notes must be determined by the law of Florida, the state where the notes were executed, and that the Supreme Court of Florida, construing the Florida Negotiable Instruments Law, has held that notes such as those in suit are negotiable: Taylor v. American Bank, 63 Fla. 631, 57 So. 678 (1912). The appellee maintains that Pennsylvania and not Florida law applies and that, measured by the standards contained in the Pennsylvania decisions, the [fol. 36] notes in suit are not negotiable. First National Bank of Miami v. Bosler, 297 Pa. 353.

It does not follow, from the fact that the notes were executed in Florida or that suit was brought in a District

Court held in Pennsylvania, that decisions of the courts of these states bind us upon the question of negotiability. The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts. Mutual Life Ins. Co. v. Lane, 151 Fed. 276, affirmed 157 Fed. 1002, certiorari denied 208 U. S. 617. Capital City State Bank v. Swift, 290 Fed. 505. Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88. Jockmus v. Claussen, 47 F. (2d) 766.

Savings Bank v. National Bank, 3 F. (2d) 970, and Niagara Fire Ins. Co. v. Raleigh, 62 F. (2d) 705, contra.

We find no precedent in the Third Circuit upon this question. In Forrest v. Safety Banking Co., 174 Fed. 345, decided after the adoption of the Pennsylvania Negotiable Instruments Law, Judge McPherson declined to determine how far the federal courts were bound by the construction given by a state court of last resort to a statute such as the Negotiable Instruments Law which attempts to codify the rules that govern a branch of general commercial law. If the state legislature had modified or changed the common law or the law merchant in its Negotiable Instruments Law, we would consider ourselves bound by the construction of the state court. We think, however, that under the rule laid down by Mr. Justice Story in Swift v. Tyson, 16 Pet. 1, the true interpretation and effect of instruments of a commercial nature are to be sought not in the decisions of the local tribunals but in the general principles and doctrines of commercial jurisprudence. We must, therefore, determine the question [fol. 37] of the negotiability of the notes in suit in accordance with what we find to be the general commercial law.

The Uniform Negotiable Instruments Law was in force in both Florida and Pennsylvania at the time of the execution of the notes. Sections 1 and 2 provide as follows:

"1. That an instrument to be negotiable must conform to the following requirements: * * *

"(2) Must contain an unconditional promise or order to pay a sum certain, in money; * * *

"2. The sum payable is a sum certain, within the meaning of this Act, although it is to be paid:

"(1) With interest; or,

"(2) By stated installments; or,

"(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; * * *."

Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due. The notes in their terms entirely negative the assertion of certainty. How can the sum due be said to be certain when there is nothing upon the face of the notes to indicate the amount of the semi-annual interest payments due to the holder? Or how can it be certain from the face of the notes whether interest payments have been deferred and, if so, to what amount deferred interest payments bear interest at 10% semi-annually?

The suit is not brought in the name of the payee but in the name of one who claims to be a holder for value. The maker, if sued by the payee, would be entitled to set up any defenses available between himself and the payee but, [fol. 38] if the instrument is negotiable, he is liable in a suit by a holder for whatever sum appears to be payable from the face of the instrument. The extent of his liability must therefore appear upon the face of the note; otherwise there is no certainty as to the sum due.

The appellant, to sustain its contention that the notes in suit are negotiable, has cited cases where the instruments sued upon were bonds to which interest coupons were attached. Those cases are not in point since it is obvious that the holder of a coupon bond can see at a glance exactly what amount is due at any given period.

We are in accord with the reasoning and conclusions of the Supreme Court of Pennsylvania in First National Bank of Miami v. Bosler, supra, and of the Supreme Court of New Jersey in Miami Shores Corporation v. Duggan, 155 Atl. 262, affirmed 160 Atl. 619. We conclude that the notes in suit are not negotiable since they lack certainty in amount, one of the essential elements of negotiability.

In view of our discussion concerning the negotiability of the notes in suit, we do not deem it necessary to do more than indicate that the Conformity Statute (28 U. S.

C. A. 724) requires that in all procedural matters we apply the law of the state within which the District Court is held.

Our conclusion is that the learned trial judge did not err in his disposition of the questions of law raised in the affidavit of defense.

The judgment of the court below is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5086

BURNS MORTGAGE CO., INC., Appellant,

vs.

ERWIN M. FRIED, Appellee

JUDGMENT—Filed Sept. 19, 1933

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is, hereby affirmed with costs.

Philadelphia, September 19, 1934.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fols. 40–55] Petition for rehearing covering 15 pages, filed Oct. 17, 1933, omitted from this print. It was denied, and nothing more by order of Nov. 15, 1933.

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ORDER DENYING PETITION FOR REHEARING—Filed Nov. 15, 1933

And now, to wit, November 15, 1933, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

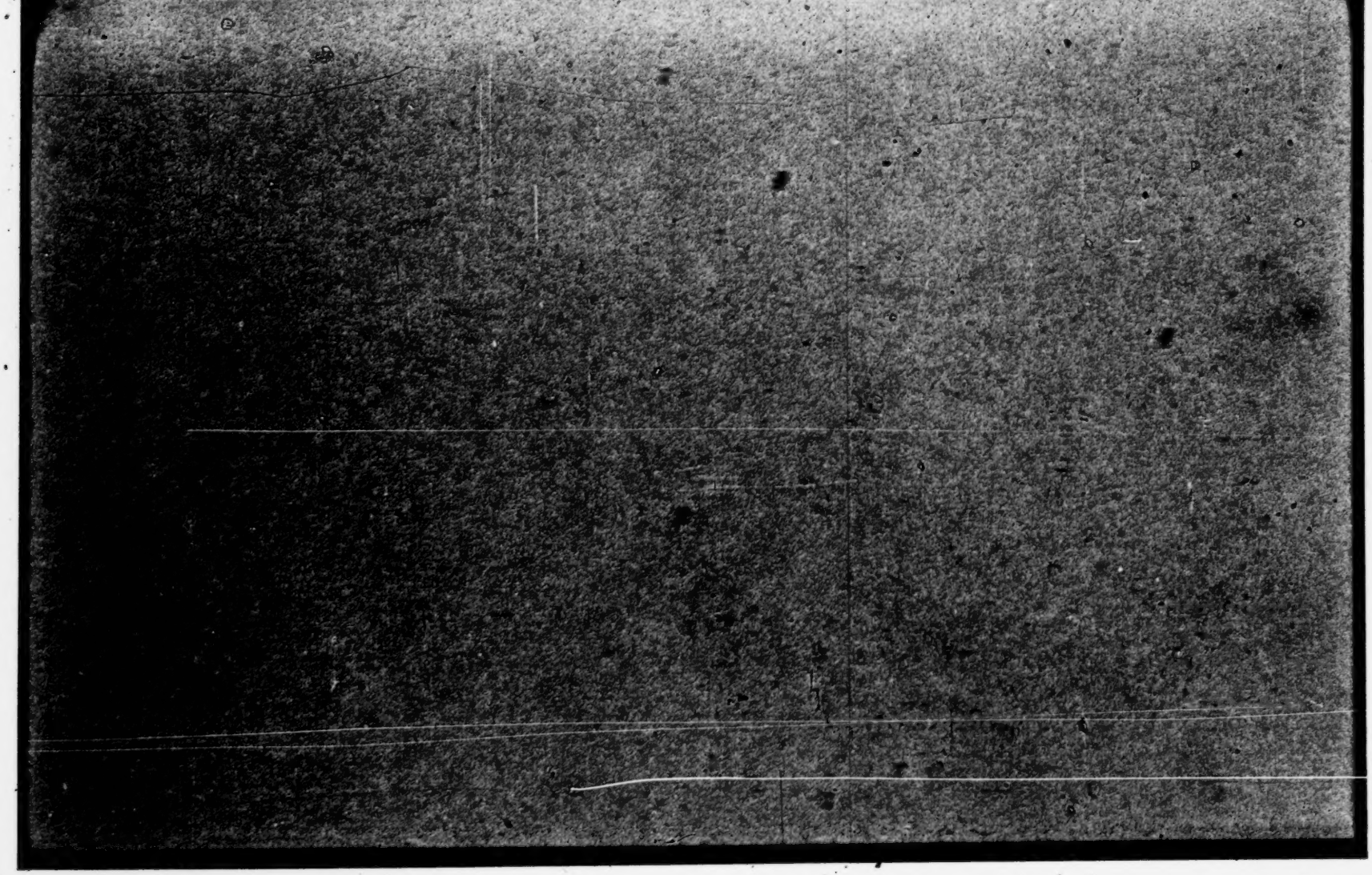
[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,389. U. S. Circuit Court of Appeals, Third Circuit. Term No. 786. Burns Mortgage Company, Inc., Petitioner, vs. Erwin M. Fried. Petition for a writ of certiorari and exhibit thereto. Filed February 13, 1934. File No. 786, O. T., 1933.



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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. **No. 786**

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. NO.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel on behalf of the petitioner, Burns Mortgage Company, Inc., pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on the 19th day of September, 1933 (R. 39), affirming the judgment of the District Court for the Eastern District of Pennsylvania (R. 23). Rehearing was denied on the 15th day of November, 1933 (R. 57).

Questions Presented

A. Whether a federal court is bound by the Judiciary Act to follow a decision by the highest court of a State which interprets the Negotiable Instruments Act of that State?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

B. Whether a federal court fails to give full faith and credit to the Negotiable Instruments Act and a decision of the highest court of a State interpreting it when, in adjudicating rights created in that State, the federal court refuses to follow that decision because the statute is declaratory?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

C. Whether the requirement of a negotiable instrument for a sum certain is met in a note which provides for interest on principal at the rate of *"7 per cent per annum from date until fully paid. Interest payable semi-annually."*, and also that *"Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually"*?

The Circuit Court of Appeals decided that:

"Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due."

Statutes Involved

A. The 34th section of the Judiciary Act (Act of September 24th, 1789 C. 20 sec. 34, 1 Stat. 92; Revised Statutes sec. 721), which provides:

> ". . . the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

B. The 1st and 2nd sections of the Uniform Negotiable Instruments Act (adopted in every state jurisdiction and more particularly in Florida by Laws 1897 C. 4524; Comp. Gen. L. 1927, secs. 6760-6929), which provides:

> "§1. *Form of Negotiable Instrument.* An instrument to be negotiable must conform to the following requirements:
>
> . . . . .
>
> (2) Must contain an unconditional promise or order to pay a sum certain in money; . . .
>
> §2. *Certainty as to Sum; What Constitutes.* The sum payable is a sum certain within the meaning of this Act, although it is to be paid:
>
> (1) With interest; or
>
> (2) By stated installments; or
>
> (3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; . . . ."

Statement of the Case

The Burns Mortgage Company, Inc., as holder, brought an action in assumpsit in the United States District Court for the Eastern District of Pennsylvania, against Erwin M. Fried, the maker, upon a series of six promissory notes for $1,000.00 each, payable six months, one year, eighteen

months, two years, thirty months and three years after date, respectively (R. 2). The notes were executed, delivered and payable in Florida (R. 3). Each note provided for an interest rate on the principal sum "of 7 per cent per annum from date until fully paid. Interest payable semi-annually," and also provided that "Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually" (R. 6, 7, 8, 9, 10 and 11).

The payee of the notes was the Golden Isles Corporation, which, prior to maturity, endorsed them in blank and delivered them for value to Walter Williamson (R. 3). The notes were not paid when due, and Walter Williamson subsequently transferred them by delivery to the plaintiff, Burns Mortgage Company, Inc. (R. 4).

The defendant in the lower Court filed an affidavit of defense raising questions of law, in the nature of a statutory demurrer, on the ground that the notes were not negotiable instruments in that they did not provide for a "sum certain."

Rulings of the Court Below

The District Court, in an opinion by Dickinson, D. J., determined that one who acquires a negotiable instrument after maturity can sue on it in his own name (R. 17). The Court held, however, that the notes in suit were not negotiable because they provided for the payment of interest prior to the maturity of the principal, and because they provided for interest at a higher rate on deferred interest payments (R. 18, 19).

The District Court, in an opinion by Dickinson, D. J., on Motion for Re-argument ignored without comment the contention of the plaintiff that, in determining the negotia-

bility of the notes, the Court must follow the law of Florida as decided by the Supreme Court of Florida, and denied the motion on the ground that there can be no certainty of sum if a note provides for interest payments prior to the maturity of principal (R. 22).

Judgment of *non pros.* was entered against the plaintiff by the District Court after the plaintiff declined to amend his suit in order to sue in the name of the payee as an assignee of an ordinary chose in action and subject to defenses available against the payee (R. 23).

The Circuit Court of Appeals, in an opinion by Thompson, C. J., affirming the judgment, held that even though the notes were executed in Florida, the Federal Court was not bound by a decision of the Supreme Court of Florida that such notes were negotiable under the Florida Negotiable Instruments Act (R. 36). The Court ruled that cases involving the negotiability of bonds having interest due prior to the maturity of principal were not in point because interest coupons were attached (R. 38). It also held that "Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due" (R. 37).

The Circuit Court of Appeals denied a Petition for Rehearing (R. 57).

Specifications of Error

1. The Circuit Court of Appeals erred in affirming the judgment of the Court below.

2. The Circuit Court of Appeals erred in denying the Petition for Rehearing.

3. The Circuit Court of Appeals erred in holding that in determining the question of negotiability of a promissory note executed, delivered and payable in Florida, the federal court was not bound by the construction of the Florida Negotiable Instruments Act by the Supreme Court of Florida.

4. The Circuit Court of Appeals erred in holding that the notes in suit were not negotiable.

Reasons for Granting the Petition

A. The decision of the Circuit Court of Appeals in this case is—as it itself admitted—directly in conflict with decisions in the Circuit Court of Appeals for the Fourth Circuit, in holding that:

> "The construction given by the state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts . . .
>
> "Savings Bank v. National Bank, 3 F. (2d) 970, and Niagara Fire Ins. Co. v. Raleigh, 62 F. (2d) 705, *contra*." (Italics supplied.)

Because of this ruling, the Circuit Court of Appeals for the Third Circuit, although dealing with Florida contracts, refused to follow the decision of the Supreme Court of Florida in *Taylor vs. American National Bank*, 63 Fla. 631, 57 So. 678 (1913), which construed the Florida Negotiable Instruments Act, and the Circuit Court held that:

> "We must, therefore, determine the question of the negotiability of the notes in suit in accordance with what we find to be the general commercial law."

B. This decision by the Circuit Court in so far as it involves the construction of the 34th section of the Judiciary Act raises an important question of federal law heretofore not decided by this Court and probably in con-

flict with the tendency and the applicable decisions of this Court in

Swift vs. Tyson, 16 Pet. 1 (1842);

Lane vs. Vick, 3 How. 464 (1845);

Jones vs. Prairie Oil & Gas Co., 273 U. S. 195 (1927);

Black & White Taxi Co. vs. Brown & Yellow Taxi Co., 276 U. S. 518 (1928).

The importance of this federal question is seen in these Law Review Articles:

Fordham, The Federal Courts and the Construction of Uniform State Laws (1928), 7 N. Car. Law Rev. 423.

Dobie, Seven Implications of Swift v. Tyson (1930), 16 Va. Law Rev. 225.

C. This decision by the Circuit Court is probably, in view of the tendency and applicable decisions of this Court, in violation of the "full faith and credit" clause of the Constitution because the Circuit Court, in dealing with a Florida cause of action, intentionally refused to give the same effect to the Florida Negotiable Instruments Act, and a decision thereunder, that would have been given in Florida.

Bradford Electric Co. vs. Clapper, 286 U. S. 145 (1932);

Royal Arcanum vs. Green, 237 U. S. 531 (1915);

Converse vs. Hamilton, 224 U. S. 243 (1912).

This Court has held that the reason here given is not a ground for appeal but that it is a reason for which a petition for certiorari may be granted.

Bradford Electric Co. vs. Clapper, 284 U. S. 221 (1931).

D. The decision of the Circuit Court of Appeals, in holding that under general commercial law a promissory note is not negotiable if it provides for the payment of interest prior to the maturity of the principal sum and for interest on deferred payments, is in conflict with the great weight of authority on this question of general law. *All* decisions prior to the adoption of the Uniform Negotiable Instruments Act, cited to the Court below and representing the great weight of authority, have held that negotiability is *not* impaired by similar provisions for interest:

Commercial Nat. Bank vs. Consumers Brewing Co., 16 App. Dist. of Col. 186 (1900);

National Bank of North America vs. Kirby, 108 Mass. 497 (1871).

Cases decided subsequent to the Uniform Negotiable Instruments Act likewise have held such notes negotiable:

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Continental etc. Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

No reported decisions have been found which take the view expressed by the Circuit Court of Appeals in the instant case.

E. The decision of the Circuit Court of Appeals is in conflict with the law of Florida where the cause of action arose. The Circuit Court refused to follow the decision by the Supreme Court of Florida in *Taylor vs. American National Bank*, 63 Fla. 631, 57 So. 678 (1913).

F. The Circuit Court of Appeals, in holding the notes non-negotiable, concluded that decisions of this Court to

the contrary, involving bonds with interest coupons attached, were not in point. But the decisions of this Court involving bonds:

Cromwell vs. County of Sac, 96 U. S. 51 (1877);

Railway Co. vs. Sprague, 103 U. S. 756 (1880);

cited with approval the following cases of ordinary promissory notes *without* interest coupons, similar to those involved in the case at Bar:

National Bank of North America vs. Kirby, 108 Mass. 497 (1871);

Boss vs. Hewitt, 15 Wis. 260 (1862).

The decision of the Circuit Court should be reviewed in the light of these applicable decisions of this Court.

G. The question of negotiability embodied in the instant appeal is of considerable moment and is not restricted to the notes involved in this suit. The same and similar printed forms are in common use, and heretofore have freely circulated as negotiable paper not only in Florida but also in many other States, including South Dakota, Washington, California, North Dakota and Arizona. Suits on notes similar in form are now pending in federal as well as state courts located in Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Suits on similar notes probably are pending in other jurisdictions throughout the United States.

This appeal is a test case by which counsel for the petitioner and other counsel who have joined with them desire to settle the status of tremendous amounts of capital invested in good faith by banks, corporations and individuals in thousands of notes similar to those involved in the instant case.

For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the United States:

In support of the petition for Writ of Certiorari, counsel on behalf of your petitioner respectfully submits the following:

Opinions Below

Two opinions were delivered by the District Court. They were written by District Judge Oliver B. Dickinson. An opinion *Sur* Statutory Demurrer was filed May 16, 1932 (R. 15) and an opinion *Sur* Motion for Re-argument was filed October 10, 1932 (R. 20).

The Circuit Court of Appeals delivered an opinion written by Circuit Judge J. Whitaker Thompson, filed on September 19, 1933 (R. 34). No opinion was delivered in the denial of a rehearing on November 15, 1933 (R. 57).

The decision of the Circuit Court of Appeals is reported in 67 F. (2d) 352.

Jurisdiction

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938). The judgment of the Circuit Court of Appeals was entered September 19, 1933. Petition for rehearing was filed on October 17, 1933 (R. 40) and denied on November 15, 1933 (R. 57).

The Facts

The facts are stated in the Petition, page 3.

ARGUMENT

A. The decision is in conflict with holdings in another Circuit Court of Appeals.

The Circuit Court of Appeals made the following ruling, which controlled its final decision:

> "The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

It cited as authority for and against this proposition the following (R. 36):

> ". . . Mutual Life Ins. Co. v. Lane, 151 Fed. 276, affirmed 157 Fed. 1002, certiorari denied 208 U. S. 617. Capital City State Bank v. Swift, 290 Fed. 505. Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88. Jockmus v. Clausen, 47 F. (2d) 766. . . .
>
> "Savings Bank v. National Bank, 3 F. (2d) 970, and Niagara Fire Ins. Co. vs. Raleigh, 62 F. (2d) 705, *contra*. (Italics supplied.)
>
> "We find no precedent in the Third Circuit upon this question."

An examination of these authorities as well as other authorities reveals that the only prior actual holding by an appellate court on the issue here involved is that of the Circuit Court of Appeals for the Fourth Circuit in

Savings Bank vs. National Bank of Goldsboro, 3 F. (2d) 970 (C. C. A. 4th, 1925).

In that case the court expressly held that it was bound by a decision of the Supreme Court of North Carolina in the interpretation of the Uniform Negotiable Instruments Act adopted in that state (at page 973):

> "In such cases, the views and interpretation placed by the state's highest court upon its own statutes, passed within the inhibitions of the federal constitution, *will be accepted and followed, although questions of commercial law and jurisprudence may be involved* or incidentally arise . . . ." (Italics supplied.)

The position of that Court was recently re-affirmed in the case of

Niagara Fire Ins. Co. vs. Raleigh Hardware Co., 62 F. (2d) 705 (C. C. A. 4th, 1933).

where the Court said (at page 708):

> "The duty of the federal courts to follow state decisions in the interpretation of state statutes is too well settled to admit of serious discussion. The rule has been followed, not only with respect to statutes dealing with local matters, but also with respect to those affecting general commercial law, such as the Negotiable Instruments Law, which was dealt with in the case of Savings Bank of Richmond v. National Bank of Goldsboro, *supra*."

In view of the rule of the Fourth Circuit as above shown, it is significant to note that this Court on February 5, 1934, denied a Petition for Certiorari in the case of

Bank of United States vs. Cuthbertson, U. S. Sup. Ct., Oct. T. 1933, No. 691,

which arose in the Fourth Circuit (67 F. (2) 182, C. C. A. 4th, 1933). One of the grounds of the Petition was that the Federal Court sitting in North Carolina, in determining the negotiability of certain bonds, erred in its construction of the Illinois Negotiable Instruments Law, which it was bound to follow. However, in that case both petitioners and respondent agreed that the law to be applied by the Federal Court was the law of Illinois for the reason that the Negotiable Instruments Act was in effect in that state. The sole question in the Petition for Certiorari was whether or not the Federal Court had *correctly construed* the Illinois Negotiable Instruments Act in absence of an expressly controlling decision by the Supreme Court of Illinois. This is illustrated by the following quotation from respondent's brief (at page 3):

> "In the Circuit Court of Appeals the *respondent* insisted, and the petitioners conceded, that the question

> of negotiability was to be determined by the law of Illinois; and petitioners and respondent now agree that Illinois law controls. Moreover, considering only *one* of the grounds of non-negotiability urged by respondent, the Circuit Court of Appeals based its decision directly upon Section 1, Sub-section 4, of the Negotiable Instruments Act of Illinois (R 272);"

It appears, therefore, that this is a clear recognition of the principle that a federal court is bound to follow the interpretation by the highest court of a state of its Negotiable Instruments Act.

It is to be noted, as indicated above, that no Circuit Court of Appeals has rendered a decision in conformance with the decision in the instant case by the Circuit Court of Appeals for the Third Circuit. Thus in the case of

> **Mutual Life Ins. Co, vs. Lane, 151 Fed. 276** affirmed under the name of **Alexander vs. Lane, 157 Fed. 1002 C. C. A. 5th, (1907)** and certiorari denied, **208 U. S. 617 (1908),**

cited as authority by the court below, there was only a *per curiam* opinion of one sentence by the Circuit Court of Appeals for the Fifth Circuit, which affirmed the lower court on the basis of two other cases that have nothing whatsoever to do with the problem in the instant case. This *per curiam* opinion did not even mention the problem here involved. It is also significant that in the petition for certiorari in that case, which was denied by this Court, the question herein stressed was not even raised.

It can also be pointed out that in the case of

> **Peterson vs. Metropolitan Life Ins Co. 19 F. (2d) 74, affirmed 19 F. (2d) 88 (C. C. A. 8th, 1927),**

also cited by the Court below as authority, it was expressly conceded in the Circuit Court (at page 90) that the note was *non-negotiable* under the Uniform Negotiable Instru-

ments Law of Iowa, and, therefore, there was no discussion of the issue involved in the principal case.

It is not the purpose, however, of this brief to review all the purported authority on this question and to indicate the extent to which this authority is at most *dicta*. But we wish to point out that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case is not only flatly in conflict with the holding of the Circuit Court of Appeals for the Fourth Circuit but also that it is in conflict with very strong *dictum* in the Circuit Court of Appeals for the Eighth Circuit, as seen in the case of

Kobey vs. Hoffman, 229 F. 486, 488 (C. C. A. 8th, 1916),

which involved the negotiability of a note executed and made payable in Missouri. Suit was brought in Kansas, and the Court said:

> "The Missouri Negotiable Instruments Law has never been construed by the Court of last resort of that state. We must therefore determine for ourselves how this statute should be construed. As the Negotiable Instruments Law, on that point, is practically a reaffirmance of the law merchant, the decisions of the Supreme Court of the United States control this court *until the highest court of the state—in this case that of Missouri—construes it*, and then it will only be authoritative on the courts of the United States as to notes and bills executed thereafter". (Italics supplied.)

We submit that since the decision of the Circuit Court of Appeals is in direct conflict with decisions in the Fourth Circuit and with very strong *dictum* in the Eighth Circuit, the Supreme Court should review the decision of the Third Circuit in the instant case in order that this question may be conclusively adjudicated.

B. The decision of the Circuit Court is an unwarranted extension of the doctrine of Swift vs. Tyson.

The Petitioner is cognizant that *Swift vs. Tyson* is an old story with this Court but, nevertheless, in order to show that the decision of the Circuit Court in the instant case is an extension of that ruling, it is necessary to direct the attention of the Court to the following statement by Judge Story in that case (at page 18):

> "In all the various cases which have hitherto come before us for decision this court has uniformly supposed that the true interpretation of section 34 limited its application to state laws strictly local, that is to say, *to the positive statutes of the state and the construction thereof adopted by the local tribunals,* and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character . . ." (Italics supplied).

This Court has continued to follow that interpretation of section 34 of the Judiciary Act, which provides as follows:

> ". . . the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

It is not the purpose of this Petition to obtain leave to attack *Swift vs. Tyson.* Its purpose is to seek a final determination on the question of whether the doctrine of that case should be *extended*—as it admittedly has been by the Circuit Court in the case at bar—further than has ever been indicated by any decision of this Court. It will, therefore, be shown: (1), In what manner the decision of the Circuit Court is an extension; and (2), that the extension is unwarranted.

Swift vs. Tyson dealt with the negotiability of a note under the law merchant. No statute was involved. In deciding that the federal court would determine for itself the negotiability of the note, Judge Story expressly stated, as seen in the quotation above, that the rule would be *otherwise* if a statute were involved. That has always been the construction of Section 34 adopted by this Court, as evidenced by the following quotation from a recent opinion of this Court written by Mr. Justice Holmes:

> ". . . no case has yet gone the length of undertaking to correct the construction of State laws by State Courts. The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the Legislature."
>
> **Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 199 (1926).**

Nevertheless, the Circuit Court has held in the instant case that it need not follow the construction of a state statute by the Supreme Court of that State. It admitted that if the statute had *modified* or *changed* the common law it would have been bound by the construction of the State Court. It held, however, that since the statute in question—the Florida Negotiable Instruments Act—is merely declaratory of the law merchant, it is not the type of statute which comes under the rule laid down in *Swift vs. Tyson*. Thus, notwithstanding the express language of *Swift vs. Tyson* and the general understanding and expression of the Supreme Court, as seen in the above statement by Mr. Justice Holmes, the Court below, in determining the negotiability of Florida notes, has refused to follow the decision by the Florida Supreme Court interpreting the Florida Negotiable Instruments Act.

It is obvious, therefore, that the Circuit Court has extended the doctrine of *Swift vs. Tyson*. The next question is whether this extension is warranted to such an extent that this Court should allow the decision to stand without reviewing it.

The time honored doctrine of *Swift vs. Tyson* has been criticized on the bases of historical research, modern conception of law in its philosophical sense, the self-centered personality of Judge Story, and statistics which have shown the part played by this decision in the overcrowding of the federal courts. None the less, *Swift vs. Tyson* is still the law, and Petitioner does not seek to attack it. It must be remembered, however, that all the criticism and arguments against *Swift vs. Tyson* apply with even greater force against the extension of that doctrine. It is with this very thought in mind that Mr. Justice Holmes, in one of his dissenting opinions, indicated the attitude of this Court upon the extension of this doctrine by the following concise and pointed statement:

> "I should leave *Swift vs. Tyson* undisturbed as I indicated in *Kuhn vs. Fairmount Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."
>
> **Black & White Taxicab vs. Brown & Yellow Taxicab, 276 U. S. 518, 535 (1928).**

The very cause of the rule of *Swift vs. Tyson* in so far as questions of general commercial law is concerned, does not apply where any kind of state statute is involved. The reason for that decision was the then existing conception of the common law as a perfect system of law under which one and only one correct answer to any legal problem was possible. In light of this conception, it was but natural that a court of wider jurisdiction, more significance and greater powers, would make its own determination of what the common law was rather than follow the

opinion of another court. However, this cause for the rule does not apply once a statute is involved because "the law" is that statute, and "the law" is not the general principles of a "system of law".

Thus, although *Swift vs. Tyson* involved negotiable instruments, it was decided at a time when no state had any comprehensive statute governing negotiable instruments. But at present every state, including Florida, has seen fit to supplant general principles of commercial law by the adoption of a positive statute—the Negotiable Instruments Act. Though the Negotiable Instruments Act is to a great degree a codification of general commercial law principles, the various legislatures deliberately adopted this comprehensive statute to be the basis for deciding all questions of negotiable instruments. As a statute, it necessarily becomes the first and authoritative point of inquiry for determination of any problem the facts of which come within its scope. The statute has become the law of the state adopting it, regardless of the *precedent* the legislature followed in formulating it.

The Negotiable Instruments Act was created by legislative process, the same as any other statute. The mere fact that it is comprehensive and to a large extent an adoption of prior commercial law principles, does not take away its character as a "positive statute" designed to be the sole authority for future court decisions in the particular State. And whatever "construction" is placed on that statute by the highest tribunal of that State must be followed by the federal courts.

But under the Circuit Court's decision in the instant case different consequences will result depending upon the precedent followed by the legislature in formulating the statute. It may be suggested at this point that the decision of the Circuit Court raises a number of queries

which themselves reveal the error in the decision: By whom, and by what test, is it to be determined whether a statute is merely declaratory of general law? Will this be determined by the federal court or by the state court? Will it depend on whether the statute itself says it is declaratory, or will it depend upon whether the particular provision looks like the rule which existed prior to the statute?

The Circuit Court of Appeals made no analysis of this problem, and it is submitted that as a result its very decision reveals what appears to be a *non sequitur*, if not an actual inconsistency. The Court held that (1) State decisions construing the Negotiable Instruments Act need not be followed by the federal courts because the statute was declaratory of the law merchant; and (2) under the law merchant the notes were not negotiable. The Court failed to take into consideration any of the decisions upon the question of the negotiability of these notes rendered under the Negotiable Instruments Act. These decisions, as pointed out *infra*, at page 32 *et seq.*, have held that the notes *are* negotiable. It follows, therefore, that if, as the Court below ruled, under the law merchant these notes were *not* negotiable, then the Negotiable Instruments Act is *not* declaratory of the law merchant. Conversely, if the Negotiable Instruments Act is declaratory of the law merchant, and under it the notes are held negotiable, it must follow that the notes *were* also negotiable under the law merchant. We submit, therefore, that since the reasoning of the Court below is fallacious under either of the two possible alternatives, its conclusion is erroneous.

The public significance of the decision of the Circuit Court cannot be over-emphasized. In recent years, there have been great advances in the codification of the common law. Uniform laws have been adopted on diverse subject

matters in all the states. One of the earliest and probably the most important of these laws is the Uniform Negotiable Instruments Act. If this decision of the Circuit Court is permitted to stand, its effect will be tremendous. In cases involving questions of bills and notes, sales, bills of lading, partnerships, stock transfers, and all the other subjects which have purportedly been unified, we will soon find the assertion of different law within the very same jurisdictional boundaries depending on whether a federal or a state court renders the decision. Such a condition would be especially deplorable in the field of bills and notes, the utility of which is based upon freedom in circulation, which in turn depends upon known legal rights that go with them.

It is for these reasons that a conclusion exactly opposite to that of the Circuit Court of Appeals is reached in two Law Review articles directly in point:

> "Our conclusion is that the doctrine of Swift and Tyson should not be applied in the construction of uniform state laws. It is required neither by consideration of authority nor by policy."
>
> **Fordham, the Federal Courts and the Construction of Uniform State Laws (1928) 7 N. Car. L. Rev. 423.**

> "It is believed, therefore, that as a solution of the immediate problem, the rule of compulsory conformity on the part of Federal Courts to the State construction of Uniform State Laws should be followed."
>
> **Dobie, Seven Implications of Swift vs. Tyson (1930) 16 Va. L. Rev. 225.**

The instant case shows still another feature which makes the problem even more acute. The notes in suit were executed and delivered in Florida. They were also payable in Florida. Authorities all agree that under the

rules of Conflict of Laws the law of Florida governs upon the question of the negotiability of these notes.

Restatement of Conflict of Laws, Proposed Final Draft No. 2, Sec. 360 (Am. L. Inst. 1931) states:

> "The law of the place of contracting determines whether a mercantile instrument is negotiable."

If suit on a note is brought in a state court in any state of the Union, the rights of the parties are uniform because Florida law governs. But if suit is brought in a federal court in the same territorial boundary, opposite rights may prevail. This would place a litigant, whose claim is large enough to warrant federal jurisdiction and where there is a diversity of citizenship, in a position to change his substantive rights by choice of the forum, even though the law of the particular State, whose decisions ordinarily would govern the instrument in question, had been positively fixed by both statute and court interpretation. If suit were brought on a note in a state court of another state, the decision, following the law of the state where the instrument was made, might be one way, and if suit were brought or removed to a federal court sitting in the same state, the decision would be entirely different. This would be a travesty on justice. No one would know what the rights of the respective parties are until litigation was completed. The Circuit Court has recognized the importance and necessity of certainty in so far as *the sum* is concerned. But it appears that in its over-zealousness on that score the Court has overlooked the great importance of the certainty of *the law* which is to govern the rights of the parties.

For the reason, therefore, that this decision of the Circuit Court is an unprecedented and unwarranted extension of *Swift vs. Tyson* which is fraught with far reaching consequences it is submitted that this Court should review the decision and reverse it.

C. A federal court violates the full faith and credit clause of the constitution where, in determining rights created in a state, it refuses to apply a decision by the highest court of that state interpreting its statute, and where this refusal is based upon the reason that the statute is merely declaratory.

In 1912, the Supreme Court of Florida decided that under the Florida Negotiable Instruments Act, adopted in 1897 (Fla. Laws 1897 C 4524; Comp. Gen. L. 1927 §§ 6760-6929), certain interest provisions in a promissory note would not render it non-negotiable:

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912).

In 1925, the notes in suit, containing interest provisions similar to those in the case decided by the Supreme Court of Florida, were made, executed and delivered in Florida. They were also payable in Florida. Prior to maturity, without notice of any defects and for valuable consideration, they were negotiated. Then they were acquired by the plaintiff, a Florida corporation, for a valuable consideration. Upon suit on these notes, the District Court for the Eastern District of Pennsylvania and the Circuit Court for the Third Circuit refused to apply the aforesaid decision of the Supreme Court of Florida which had held these interest provisions would not render the notes non-negotiable. Under their own interpretation of the law merchant the federal courts below held the notes were *not* negotiable. Its refusal to apply the Florida decision, the Circuit Court said, was because the Florida Negotiable Instruments Act was a declaratory statute and not a statute which changed the law merchant.

The opening section of

Article 4 of the United States Constitution

provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The question here is whether the Circuit Court has given "full faith and credit" to the "public acts, . . . and judicial proceedings" of the State of Florida.

It is, of course, no longer open to question that a federal court, like a State Court, must comply with the "full faith and credit" clause:

Bradford Electric Co. vs. Clapper, 286 U. S. 145 (1932).

This same case has reiterated the principle long ago adopted that full faith and credit must be given to State statutes. Since full faith and credit had to be given to statutes, it was but natural to hold that full faith and credit must be given to decisions interpreting those statutes:

Royal Arcanum vs. Green, 237 U. S. 531 (1915);
Converse vs. Hamilton, 224 U. S. 243 (1912).

A reason for this conclusion is seen in this statement by Mr. Justice Holmes in

Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 200 (1926):

> "The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the Legislature."

Then also is there this very forceful statement by Mr. Justice Field in the case of

Louisiana vs. Pilsbury, 105 U. S. 278, 294 (1881):

> "The exposition given by the highest tribunal of the State must be taken as correct so far as contracts

made under the Act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. *So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it.*" (Italics supplied.)

The notes in suit became binding obligations in accordance with the laws of Florida. The Circuit Court did not deny this. It held, however, that because the Florida Negotiable Instruments Act was declaratory of the law merchant, a federal court did not have to give the same effect to its construction as if it were a statute that changed the law merchant. Upon what does the Circuit Court base its distinction as to the effect that must be given to state statutes? In Florida the same effect is given to its statutes irrespective of the historical development or precedent behind the Statute, and irrespective of whether the statute codified or changed its common law. It is submitted, therefore, that when the Circuit Court gave less effect to the Florida Negotiable Instruments Act because of a distinction which is not recognized in Florida the Circuit Court failed to give "*full faith and credit*" to a "*public act*" of the State of Florida.

The Circuit Court failed to give full faith and credit not only to a "public act", but also to "a *judicial proceeding*" of the State of Florida. The Florida Supreme Court had held similar notes negotiable under the Florida Negotiable Instruments Act. The Circuit Court expressly re-

fused to follow the decision. This was in violation of the full faith and credit clause as stated by this Court in

American Surety Co. vs. Baldwin, 287 U. S. 156, 166 (1932):

"The full faith and credit clause, together with legislation pursuant thereto, applies to judicial proceedings of a State Court drawn in question in an independent proceeding in the Federal Courts."

The basis of petitioner's contention is not that the Circuit Court has erroneously *construed* the Florida Negotiable Instruments Act or decisions thereunder. If that were so, it is recognized that, as stated by Mr. Justice Brandeis by way of footnote in the recent opinion in:

Ohio vs. Chattanooga Boiler, 289 U. S. 439, 443 (1933):

"Had the question been merely the construction of the Statute, no issue under the full faith and credit clause would have arisen."

Thus, in one of the cases cited for that proposition:

Banholzer vs. New York Life Ins. Co., 178 U. S. 402, 406 (1900),

this Court said:

"The ruling was a construction of the Statute, *not a denial of its validity,* and that the Court meant no more, and meant to follow, *not oppose,* the decisions of the State, is evident from its Opinions." (Italics supplied.)

And, in another case, also cited by Mr. Justice Brandeis:

Pennsylvania Fire Ins. Co. vs. Gold Issue Min. & Mill Co., 243 U. S. 93 (1917),

this Court said:

"There is nothing to suggest that it was not candidly construing the Colorado Statute to the best of its ability, and, even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article 4, §1".

It will be noted that in the case at bar, as pointed out above, the issue is not whether the Circuit Court has *misinterpreted* the Florida Negotiable Instruments Act, nor is it whether the Circuit Court has *misinterpreted* the Florida decisions construing the Florida Negotiable Instruments Act. The issue here is whether the Circuit Court erred in *refusing to follow* a decision which it expressly *recognized* settled the law in so far as Florida or a Florida Court was concerned.

Furthermore, Petitioner wishes to point out that under this argument it is not resorting to the "full faith and credit" clause in order to have this Court become a final arbiter of questions of *conflict of laws* even though it has been suggested that such a result is being approached by decisions of this Court:

Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. Law Rev. 533.

In the instant case that position need not be taken. It is not contended that the Circuit Court has violated any principle of conflict of laws. The Circuit Court did not deny that Florida Law governs the substantive rights resulting from the negotiability of a note. The error of the Circuit Court, it is submitted, was committed when it decided that it could determine the question of negotiability for itself, and that it need not follow a Florida Supreme Court decision that interpreted the Florida Negotiable Instruments Act, giving as its reason a supposed distinction between declaratory and non-declaratory statutes, which distinction, as pointed out above, is not recognized in Florida.

Refusal by a federal court to give full faith and credit to a state decision interpreting a state statute because the statute is declaratory of the common law is not only a denial of a constitutional right, guaranteed by Article 4, § 1, but will have the effect of destroying the very purpose of these uniform statutes, which is to create uniformity in the law throughout the country. It is, therefore, urged that this is another reason why this Court should review and reverse the decision of the Circuit Court.

D. Under the law merchant notes are not rendered non-negotiable by provisions for interest to become due before maturity of principal and for interest at a higher rate on deferred interest payments.

It should be noted at the outset that the instruments in question are the familiar printed form of notes which are commonly used in many jurisdictions, including Arizona, California, Florida, North Dakota, South Dakota and Washington. It is a form adapted and used for long term obligations. It is also commonly used in the above jurisdictions as a substitute for the familiar bond and warrant which accompanies the real estate mortgage.

Inasmuch as these are long term notes, and in view of their utilization as investments, a very important feature is their provision for interest. After many years the form of the notes in suit was found best to carry out the expediencies of commercial trade. The commercial advantages of these notes are easy to explain. Interest being an important factor of any credit transaction, the interest provisions in the notes are primarily aimed to obtain the prompt payment of interest. This is done in two ways: (1) by providing for periodical payments of interest; and (2) by providing for a higher rate of interest on deferred interest payments, *i. e.*, interest not paid when due.

The sole question here is whether these provisions, which are aimed at the prompt payment of interest, make the sum uncertain and, therefore, render the notes non-negotiable. Certainty of sum has always been recognized as a requisite of a negotiable instrument. In ancient days, whether the purpose of the instrument was to provide credits in places to which the transportation of valuable gold and silver would be difficult or whether the purpose of

the instrument was to enable one to get a quick summary judgment in the merchant's court at the town fair, the reason for the rule was clear—the instrument must speak for itself. This same reason exists today. It should be noted however, that provisions aimed toward the *fulfilling* of the obligation do not render the sum uncertain. Outstanding examples of this are provisions accelerating maturity for non-payment of part of the obligation as it becomes due and provisions for attorneys' fees. These provisions caused some difficulty prior to the Uniform Negotiable Instruments Act, but now it is clear that such provisions do not deprive a negotiable instrument of its essential character as "a courier without luggage".

With this commercial background, we can better approach the problem from a legal standpoint. The interest provisions in the notes, as above indicated, have a two-fold aspect and, therefore, we shall treat each of them separately.

The provisions of the Uniform Negotiable Instruments Act, also adopted in Florida, applicable to certainty of sum, are:

"§1. *Form of Negotiable Instrument.* An instrument to be negotiable must conform to the following requirements: • • •

(2) Must contain an unconditional promise or order to pay a sum certain in money; • • •

§2. *Certainty as to Sum; What Constitutes.* The sum payable is a sum certain within the meaning of this Act, although it is to be paid:

(1) With interest; or

(2) By stated installments; or

(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; • • •

(a) Interest payable in installments before maturity of principal.

Both the District Court (R. 22) and the Circuit Court of Appeals (R. 37) held, *without citing any authority whatsoever*, that there can be no certainty in a note providing for semi-annual payments of interest before the maturity of the principal because, in the language of the Circuit Court of Appeals:

> "How can the sum due be said to be certain when there is nothing upon the face of the notes to indicate the amount of the semi-annual interest payments due to the holder."

Both courts cited the case of *First National Bank vs. Bosler*, 297 Pa. 353, 147 Atl. 74 (1929), but the District Court expressly stated as to the doctrine of that case:

> "It is not on all fours with the instant case upon the question of whether or not the instrument here sued upon is negotiable."

Similarly, the Circuit Court of Appeals merely stated that it was in accord with the "reasoning and conclusion" in that case but it by no means considered that case as an authority on the question of the negotiability of a note providing for semi-annual interest.

The total lack of any common law authority in support of the Circuit Court's view is aptly indicated by the case of

Commercial Natl. Bank vs. Consumers Brewing Co., 16 App. D. of C. 186, 199 (1900),

wherein the Court of Appeals of the District of Columbia said:

> "Agreement is apparently universal, also, that stipulations for the payment of interest at stated periods, before the maturity of the principal, do not impair negotiability."

In addition to this case the decision of the Circuit Court conflicts with at least two other decisions rendered prior to the Uniform Negotiable Instruments Act:

National Bank of North America vs. Kirby, 108 Mass. 497 (1871);

Boss vs. Hewitt, 15 Wisc. 260 (1862);

and with at least four decisions subsequent to that Act:

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912);

Commercial Savings Bank vs. Schaffer, 190 Ia. 1088, 181 N. W. 492 (1921);

Continental etc. Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

In every one of these cases interest was payable in installments *before* the maturity of the principal, and nevertheless in each case the note was held negotiable.

Thus, in the Florida case the principal was due two years after date but interest was *payable quarter-annually.* The Supreme Court of Florida, after citing the Florida Negotiable Instruments Act, said:

> "It will be observed that the note for $2,250.00, purchased by the appellee, as alleged in the bill of complaint *is for a sum certain,* and would be, under the provisions of such section, even if it contained a provision to the effect that, upon default in payment of any installment of interest, which interest is payable quarter annually, the whole amount of such note should thereby become due and payable. The note contains no such provision, but the accompanying mortgage, given to secure the payment of the indebtness and which was assigned to the appellee at the same time that the note was endorsed to it does contain such provision. *It cannot be successfully contend*

ed, then, that such note was not negotiable or that the accompanying mortgage was not assignable." (Italics supplied.)

Similarly, in *Barker vs. Sartori, supra*, the Court, in deciding that under the Negotiable Instrument Law the note was "an unconditional promise or order to pay a sum certain in money", said:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money. The fact that the interest was payable in installments does not render the notes uncertain, for the statute expressly provides that payments may be made by installments. This applies as well to interest as to the principal. *The argument made by counsel, that an installment may not be paid when due and therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal where payable by installments.*" (Italics supplied.)

Since the Circuit Court ruled that the Negotiable Instruments Act codified the law merchant on this question, the Act itself can be considered as authority. It will be noted that section 2 (3) of the Negotiable Instruments Act, which we have cited above, clearly contemplates the payment of interest in installments before maturity, because it provides that the certainty of the sum is not affected by the provision for payment in installments and "that upon default in payment of any installment or of interest, the whole shall become due." The words "installment" and "interest" in the proviso obviously refer to the prior clauses (1) and (2). Thus, the proviso includes two contingencies that accelerate the payment of the balance of the principal. One is a "default in payment of any installment" of principal, and the other is a default in the pay-

ment of any installment "of interest." The only way in which there could be a default in the payment of interest before the balance of prineipal becomes due is if interest is payable in installments.

The decision of the Circuit Court is not only in conflict with all authority and the Negotiable Instrument Act, as above set forth, but it also is apparently in conflict with two analogous decisions of this Court. These decisions involved the question of whether one who acquired a negotiable bond after an installment of interest was unpaid, could be a holder in due course. Thus the issues in those cases went further than the mere question of the negotiability of the instruments, and this Court held that the purchasers were holders in due course of negotiable instruments:

Cromwell vs. County of Sac, 96 U. S. 51 (1877);
Railway Company vs. Sprague, 103 U. S. 756 (1880).

The Circuit Court of Appeals has attempted to rule out the significance of these cases to the issue presented in the instant case in that these cases involved bonds "with coupons attached." Manifestly this difference in fact exists, but merely pointing to such a difference is not sufficient to sweep away the efficacy of decisions of this Court.

A very convincing argument that the presence of coupons on the instrument has no effect is seen in the fact that in both of the above mentioned decisions of this Court, there was cited, with approval, the leading case on the question of whether one can be a holder in due course who acquires a promissory note after default in the payment of an installment:

National Bank of North America vs. Kirby, supra.

This early Massachusetts case, which was cited with approval by this Court, involved an ordinary *note without*

coupons attached. The presence or absence of coupons or of interest endorsements may possibly be construed to affect the question of whether one is a holder in due course but it does not in any way whatsoever affect the negotiability of the instruments.

It is submitted that the Circuit Court misinterpreted the law merchant, under which the negotiability of notes, providing for interest payable in installments before the maturity of principal, is conclusively established not only by all State authorities which are directly in point, but also by decisions of this Court which approved several of these State decisions. The decision of the Circuit Court should, therefore, be reviewed and reversed.

(b). Interest upon unpaid interest at a higher rate.

The Circuit Court of Appeals in rendering its decision joined this issue directly with the former issue and treated them exactly the same. Counsel for the Petitioner has found no case which has held that such interest provision renders a note non-negotiable. On the contrary, there are the following decisions, in each of which notes, providing for interest on principal at a given rate and interest on unpaid interest at a higher rate, were held negotiable:

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Continental Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

Thus, in *Lister vs. Donlan, supra,* the Court held a note is negotiable which "bears interest at six per cent per an-

num, payable annually, and contains this clause: 'Interest or principal not paid when due to draw interest thereafter at ten per cent per annum until paid.' ''

Similarly, in *Continental Bank vs. Jefferson, supra,* a note dated March 1, 1923, and providing as follows, was held negotiable:

> "March 1, 1924, after date, without grace, I promise to pay to the order of . . . $7,500.00 . . . with interest at the rate of 8 per cent per annum, payable semi-annually, from date until due.
>
> "Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 10 per cent per annum, payable semi-annually, until paid . . . ''

In *Barker vs. Sartori, supra,* the note read as follows:

> "Two years after date, without grace, for value received, I promise to pay to the order of W. the sum of $1,000.00 with interest, at the rate of 7% per annum from date until paid. Interest to be paid semi-annually, and if not so paid to bear interest after delinquency until paid at the rate of 9% per annum."

In upholding its negotiability the Supreme Court of Washington said:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money."

A prior decision by even the Circuit Court of Appeals of the Third Circuit has held that interest payable semi-annually with a higher interest rate on unpaid interest does not render a note non-negotiable:

DeHass vs. Roberts, 70 F. 227 (C. C. A. 3rd, 1895).

The Court there said:

> "The note and coupons are mercantile instruments, not only according to the law of Kansas, by

> which the parties bound themselves, but according to the law merchant as well; and we deem it unnecessary to add anything to that the Court has so well said on the subject."

It is true that in that case there was involved a note with coupons attached, but, as it has been pointed out above, this fact is irrelevant where the issue is simply whether the instrument is a negotiable one.

One case which might, at the first blush, seem to oppose the cases upholding the negotiability of these notes is

First National Bank vs. Bosler, 297 Pa. 353, 147 Atl. 74 (1929).

But in that case there was at one place a provision for interest at *eight* per cent on principal *until fully paid* and at another place a provision for interest at the rate of *ten* per cent on *deferred payments*, which would include both principal and interest not paid when due. It was on account of this apparent irreconcilability that the Pennsylvania Supreme Court held the note non-negotiable, saying:

> "The present note has, therefore, two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear eight per cent *until fully paid*, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity."

It is this fact which shows that the *Bosler case* raises an issue entirely separate from that of the case at bar. The Court also said:

> "So, also, we have found others which say that a sum certain obtains, if one rate of interest is charged until maturity and a different rate thereafter. Under these latter cases, if the note in suit had said that interest was to be payable 'at the rate of eight per cent per annum from date until [maturity, not until] fully paid [as it in fact says] . . . deferred payments to

bear interest from maturity at ten per cent per annum,' it would have been negotiable."

Even assuming the correctness of the Pennsylvania decision, that there is an ambiguity or irreconcilability in the provisions of the *Bosler case,* it does not follow that that renders the note non-negotiable because "Ambiguities do not necessarily invalidate negotiability."

Goodrich, Certainty in Negotiable Paper. (1929), 2 Pa. Bar Ass'n. Quarterly 10, 13.

The Appellate Division of the New York Supreme Court recently refused to follow the *Bosler case* and decided that the identical notes were negotiable in

Lessen vs. Lindsey, 238 App. Div., 262, 264 N. Y. Supp. 391 (1933).

It must also be remembered that unlike the *Bosler case* the interest provisions of the notes in the principal case are by no means ambiguous or irreconcilable. They simply provide for interest on *principal* before and *after* maturity at the rate of seven per cent, and also provide for interest at a higher rate on deferred *interest* payments. But it will be observed that these notes do *not* provide for a higher rate of interest on *principal after* maturity, as did the *Bosler case.*

It is submitted, therefore, that the decision of the Circuit Court that under the law merchant the notes were not negotiable because of the interest provisions, is untenable and in conflict with all authority, and Petitioner prays that this Court review and conclusively adjudicate this important question of general law.

E. Conclusion.

This is a test case. The decision of the Circuit Court has rendered uncertain the negotiability of notes throughout the entire country. This uncertainty in the status of many millions of dollars of obligations in this form should not exist. As a result of the decision of the Circuit Court, the negotiability of similar notes is being attacked, and will be attacked, in suits pending in almost every state of the Union. It is for this reason that other counsel have joined with counsel for the Petitioner to have this Court conclusively adjudicate the status of these notes.

It has been shown that the decision of the Circuit Court is in direct conflict with a holding in another Circuit Court.

It has also been shown that the refusal by this Circuit Court to follow the decisions of the highest court of Florida interpreting the Florida Negotiable Instruments Act is probably erroneous because of: (1) decisions of this Court in the construction of the 34th section of the Judiciary Act; and (2) decisions of this Court involving the "full faith and credit" clause of the Constitution.

It has been indicated that the Circuit Court, in holding that under the law merchant the notes in suit were not negotiable, has probably erred because of: (1) decisions under the law merchant and prior to the Negotiable Instruments Act; (2) decisions subsequent to the Negotiable Instruments Act; (3) decisions of this Court, and (4) a decision of the Supreme Court of Florida where the cause of action arose.

Aside from the importance of the question of the negotiability of notes in a form which commerce has found to be expedient, and aside from the probable error of the Circuit Court, there must be taken into consideration the

effect of the decision of the Circuit Court as a precedent in every case in a federal jurisdiction where any kind of uniform or declaratory statute is involved. If the decision of the Circuit Court remains as a precedent unreviewed by this Court, it will be followed in other cases in the federal courts and will mean that no issue in the interpretation of any uniform statute shall ever be conclusively adjudicated until there has been a ruling by this Court on that issue.

For these reasons, it is submitted that this Court should grant the petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 786.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. **No. 786.**

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

vs.

ERWIN M. FRIED.

BRIEF OF PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel on behalf of the Petitioner respectfully submit the following:

Opinions Below.

The decision of the Circuit Court of Appeals is reported in 67 F. (2d) 352.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938). The judgment of the Circuit Court of Appeals was entered September 19, 1933. Petition for rehearing was filed on October 17, 1933 (R. 25) and denied on November 15, 1933 (R. 26). Petition for Certiorari was filed on February 13, 1924, and Certiorari was granted on March 19, 1934.

Questions Presented

A. Whether the requirement of a negotiable instrument for a sum certain is met in a note which provides for interest on principal at the rate of *"7 per cent per annum from date until fully paid. Interest payable semi-annually."*, and also that *"Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually"*?

The Circuit Court of Appeals decided that:

"Under the law merchant, provisions for the payment of a principal sum with interest together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due."

B. Whether a federal court is bound by the Judiciary Act to follow a decision by the highest court of a State which interprets the Negotiable Instruments Act of that State?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

C. Whether a federal court fails to give full faith and credit to the Negotiable Instruments Act and a decision of the highest court of a State interpreting it when, in adjudicating rights created in that State, the federal court refuses to follow that decision because the statute is declaratory?

The Circuit Court of Appeals decided that:

"The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

Statement of the Case

The Burns Mortgage Company, Inc., as holder, brought an action in assumpsit in the United States District Court for the Eastern District of Pennsylvania, against Erwin M. Fried, the maker, upon a series of six promissory notes for $1,000.00 each, payable six months, one year, eighteen months, two years, thirty months and three years after date, respectively (R. 2). The notes were executed, delivered and payable in Florida (R. 2). Each note provided for an interest rate on the principal sum "of 7 per cent per annum from date until fully paid. Interest payable semi-annually," and also provided that "Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually" (R. 4, 5, 6, 7).

The payee of the notes was the Golden Isles Corporation, which, prior to maturity, endorsed them in blank and delivered them for value to Walter Williamson (R. 3). The notes were not paid when due, and Walter Williamson subsequently transferred them by delivery to the plaintiff, Burns Mortgage Company, Inc. (R. 3).

The defendant, in the lower Court, filed an affidavit of defense raising questions of law, in the nature of a statutory demurrer, on the ground that the notes were not negotiable instruments in that they did not provide for a "sum certain" (R. 7).

The District Court, in an opinion by Dickinson, D. J., (R. 10), determined that one who acquires a negotiable instrument after maturity can sue on it in his own name (R. 12). The Court held, however, that the notes in suit were not negotiable because they provided for the payment of interest prior to the maturity of the principal, and because they provided for interest at a higher rate on deferred interest payments (R. 12, 13).

The District Court, in an opinion by Dickinson, D. J., (R. 13), on Motion for Re-argument, ignored without comment the contention of the plaintiff that, in determining the negotiability of the notes, the Court must follow the law of Florida as decided by the Supreme Court of Florida, and denied the motion on the ground that there can be no certainty of sum if a note provides for interest payments prior to the maturity of principal (R. 15).

Judgment of *non pros.* was entered against the plaintiff by the District Court after the plaintiff declined to amend his suit in order to sue in the name of the payee as an assignee of an ordinary chose in action and subject to defenses available against the payee (R. 16).

The Circuit Court of Appeals, in an opinion by Thompson, C. J., affirming the judgment (R. 21), held that even though the notes were executed in Florida, the Federal Court was not bound by a decision of the Supreme Court of Florida that such notes were negotiable under the Florida Negotiable Instruments Act (R. 23). The Court ruled that cases involving the negotiability of bonds having interest due prior to the maturity of principal were not in point because interest coupons were attached (R. 24). It also held that "Under the law merchant, provisions for the payment of a principal sum with interest, together with interest upon deferred interest payments, such as are contained in the notes in suit, result in making for uncertainty in the sum due" (R. 24), and render the notes non-negotiable.

The Circuit Court of Appeals denied a Petition for Rehearing (R. 26).

Assignment of Errors.

1. The Circuit Court of Appeals erred in affirming the judgment of the Court below.

2. The Circuit Court of Appeals erred in denying the Petition for Rehearing.

3. The Circuit Court of Appeals erred in holding that in determining the question of negotiability of a promissory note executed, delivered and payable in Florida, the federal court was not bound by the construction of the Florida Negotiable Instruments Act by the Supreme Court of Florida.

4. The Circuit Court of Appeals erred in holding that the notes in suit were not negotiable.

Summary of Argument.

A. The basic issue of this case is whether certain instruments, executed, delivered and payable in Florida, were non-negotiable because of their interest provisions. It will be shown that the notes are negotiable because:

(1) commercially the instruments are recognized as negotiable;

(2) legal authorities recognize them as negotiable; and

(3) on principle they should be recognized as negotiable.

The holding of the lower Court should, therefore, be reversed on the ground that the instruments are negotiable.

B. The lower Court also held that a decision of the highest Court of the State of Florida which interpreted the Florida Negotiable Instrument Act was not binding upon the federal court because that Act was declaratory of the common law. It will be shown that the lower Court was bound by the decision of the highest Court of Florida in interpreting the Florida statute because:

(1) Section 34 of the Judiciary Act compels a Federal Court to be bound by "the laws of the several states • • • in cases where they apply"; and

(2) Article IV of the Federal Constitution compels a federal court to give "Full Faith and Credit" to the "public Acts • • • and judicial Proceedings" of the State of Florida.

The holding of the lower Court, therefore, should be reversed also on the ground that a federal court is bound by the decision of the highest court of Florida in interpreting the Florida Negotiable Instruments Act.

ARGUMENT.

A.

PROVISIONS FOR INTEREST ON PRINCIPAL AT 7% FROM DATE, PAYABLE SEMI-ANNUALLY, AND FOR INTEREST ON DEFERRED INTEREST PAYMENTS AT 10% FROM MATURITY, PAYABLE SEMI-ANNUALLY, DO NOT PREVENT INSTRUMENTS FROM BEING NEGOTIABLE.

1. Commercially the instruments are recognized as negotiable.

This Court, apparently for the first time, is confronted with the fundamental problem of the negotiability of instruments as affected by their interest provisions. Were this the day of Lord Mansfield, the following quotation from Chitty on Bills and Notes, *194, shows how the negotiability of bills and notes would probably be determined:

> "The courts have always, in mercantile affairs, endeavored to adapt the rules of law to the course and method of trade and commerce, in order to promote it; and when new cases have arisen on the mercantile law, they consult traders and merchants as to their usage in regard to bills."

Such a solution today is, of course, out of the question. However, its underlying principle should not be ignored. Thus it has been stated very appropriately in reference to the effect of attorneys' fees on negotiability:

> "The whole question is, do they render the instruments so uncertain as to destroy their fitness to pass current in the business world? The business world itself ought to be permitted to answer that question."
>
> **Cudahy Packing Co. vs. State Nat. Bank, 134 Fed. 538, 545 (C. C. A. 8th, 1904.)**

Under the early common law, an investigation of business practices concerning bills and notes would not be undertaken by the court. Such practices, however, soon became recognized as part of the law merchant and as such they became material as relating to a custom, which could be proved as a fact. It was not long, however, before the law merchant came to be recognized as "law" and the common law courts began to give effect to commercial practices just as if they were part of the common law. Thus from this point on courts of their own accord took judicial notice of current business practices in regard to bills and notes. An excellent discussion of this historical development is found in Note A to the case of

Mandeville and Jameson vs. Riddle & Co., 5 U. S. 290 (1803).

This brings the issue to the determination of whether the "business world" would deem the instruments in suit negotiable. The controversy centers about the interest provisions only. These provisions have a two-fold effect. They provide for: (1) the periodical payment of interest before the maturity of principal; and (2) the payment of a higher rate of interest on such interest as is not paid when due.

The notes, it will be noted, are long term obligations under seal. Such notes are in common usage throughout the country, and are generally used in two types of transactions. Corporate debentures are commonly in this form. Sometimes these have coupons attached, the so-called coupon bond, and at other times coupons are not attached. The other type of security, in the form of the notes in the case at bar, is represented by obligations secured by mortgage. Sometimes the fact that they are so secured is indicated on their face, whereas at other times there is no such indica-

tion. Notes of this type are used as a substitute for the familiar bond and warrant which accompanies the real estate mortgage.

In view of the use of notes as ordinary corporate debentures and as evidences of indebtedness secured by mortgage, their interest provisions are very important features. This importance, of course, lies in the fact that the investor is interested in a regular income. To effectuate that purpose, these notes first provide for the semi-annual payment of interest, and then, to aid in the accomplishment of that purpose, they provide for interest upon interest if it is unpaid.

The commercial advantages of notes with such interest provisions led to their early adoption in business. Thus in the early case of

Riker vs. Sprague Mfg. Co., 14 R. I. 402, 403 (1884)

there is a printed note providing for interest before maturity and interest on interest as follows:

"Three years from Jan. 1st, 1874, for value received, * * * promise to pay to the order of * * * One Thousand Dollars, with interest from Jan. 1st, 1874, *payable semiannually,* at the rate of seven and three tenths *per cent. per annum,* till said principal sum is paid, whether at or after maturity; *and all instalments of interest in arrear shall bear interest* at the rate aforesaid till paid, but reserving the right to pay this note before maturity in instalments of not less than (5) *per cent.* of the principal thereof, at any time the semi-annual interest becomes payable." (Italics supplied.)

SECURED BY MORTGAGE

In

2 Paton's Digest on Legal Opinions and Banking Laws (1926), p. 2052,

there are shown forms of notes used in Arizona and California which provide for interest payable periodically and

with further provisions that, if not paid when due, interest is to bear interest.

In one of the form books most often referred to,

Cutler's Tiffany's Form Book (2nd ed. 1927) p. 1617,

there are forms of mortgage notes with interest payable in installments. These forms are shown with and without interest coupons attached.

In many States, there have been adjudications by the Courts which reveal notes with provisions similar to those in the notes at bar. It is obvious that, if there have been many decisions involving such notes, they must be in wide use and circulation. Throughout this brief, counsel for petitioner will cite cases with such provisions that arose in the following jurisdictions: District of Columbia, Florida, Iowa, Massachusetts, Montana, New Jersey, New York, Pennsylvania, South Dakota, and Washington. This widespread use of such provisions in notes can only mean that the business world has recognized their expediency.

Assuming the validity of the sole contention against the negotiability of such instruments, *i. e.*, that they are not for a mathematical sum certain, the language of Mr. Justice Grier in

Mercer County vs. Hacket, 68 U. S. 83 (1863)

is very apropos:

> "A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malliability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common

law * * * That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every State in the Union, is well known and admitted."

It is with this thought in mind that Prof. Chafee in his article on

Acceleration Provisions in Time Paper (1919) 32 Harv. L. Rev. 747, 751,

has stated:

"It must not be forgotten, however, that these rules of certainty are not mathematical formulae evolved out of the pure reason of the judges, but are business requirements created by business needs and susceptible of modifications with changing commercial conditions. Law is made for business, not business for law. While the influence of custom on legal principles has sometimes been exaggerated, *the history of negotiable instruments leaves no doubt that the courts have based the governing principles upon actual commercial practice,* though modifying it when it seemed unreasonable or out of accord with general considerations of justice." (Italics supplied.)

Since current business practice, as shown above, has sanctioned the instruments in suit, this Court should likewise sanction their use and hold that they are not rendered non-negotiable merely because they provide for interest payable semi-annually and interest on interest at a higher rate if it is not paid when due.

2. Legal Authorities recognize the instruments as being negotiable.

The commercial advantages of the notes, as indicated above, were due to the provisions for interest payable in installments and for interest on unpaid interest. To determine how the legal authorities have treated these provisions it is convenient to treat them separately.

(a) Interest payable in installments before maturity.

Examination of the authorities has not disclosed one single case which has held that an instrument is non-negotiable because it provided for interest payable in installments before maturity. This same conclusion is seen in

Commercial Nat. Bank vs. Consumers Brewing Co., 16 App. D. C. 186, 199 (1900),

where the Court said:

> "Agreement is apparently universal, also, that stipulations for the payment of interest at stated periods, before the maturity of the principal do not impair negotiability; and whether those periods recur monthly, as in this instrument, or less frequently as is usual, can of course, make no difference."

A similar holding under the Negotiable Instruments Act is seen in

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911),

where the negotiability of a note with interest installments prior to maturity of principal was upheld in the following language:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money. The fact that the interest was payable in installments

> does not render the notes uncertain, for the statute expressly provides that payments may be made by installments. This applies as well to interest as to principal. The argument made by counsel, that an installment may not be paid when due, and therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal, where payable by installments."

Under the law of Florida, it is well settled that a provision in a note, calling for the payment of interest in installments before the maturity of the principal sum of the note, does not destroy the certainty of amount or its negotiability. The leading Florida case on the point is

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912).

In that case, suit was brought upon a promissory note for $2250.00 due and payable two years after date, *with interest* from date at the rate of eight per cent per annum, *payable quarter-annually*. The note was accompanied by an ordinary real estate mortgage, which contained a provision to the effect that, upon default in the payment of any installment of interest, which interest was payable quarter-annually, the whole principal amount of the said note thereupon became due and payable. The defense was that the note was not negotiable because of uncertainty. The Florida Supreme Court held that the note was negotiable notwithstanding the provision calling for interest payments prior to the maturity of the principal of the note. The Court in its opinion, after citing Section 2 of the Negotiable Instruments Law, said:

> "It will be observed that the note for $2,250.00, purchased by the appellee, as alleged in the bill of complaint *is for a sum certain*, and would be, under the provisions of such section, even if it contained a provision to the effect that, upon default in payment of any installment of interest, *which interest is payable*

quarter annually, the whole amount of such note should thereby become due and payable. The note contains no such provision, but the accompanying mortgage, given to secure the payment of the indebtedness and which was assigned to the appellee at the same time that the note was endorsed to it does contain such provision. *It cannot be successfully contended, then, that such note was not negotiable* * * *"

"Having found that the note in question was negotiable, we must now determine whether or not, at the time it was purchased and taken by the appellee, it was overdue * * *" (Italics supplied.)

Probably the most significant fact showing the negotiability of instruments with similar interest provisions is the host of cases with such provisions where court and counsel did not even question the negotiability of such instruments. Indeed, one of the most important conflicts of the law of bills and notes is based on the negotiability of such instruments. This conflict involves the question of whether one is a *holder in due course* who acquires the instrument prior to maturity of principal but after a default in payment of an interest installment. This obviously presupposes negotiability. The leading case on this issue is

National Bank vs. Kirby, 108 Mass. 497 (1871),

which involved a note payable at the end of four years, with interest payable annually, and the Court held that a default in the payment of an interest installment was not sufficient to prevent the holder from being a holder in due course. The following quotation from that case shows the basic reason for the decision (at p. 502):

"There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate and secured by mortgage, espe-

cially in this country, are of this class, as are most of the obligations for debts contracted by public and many of those incurred by private corporations, and it is important that the value due to their negotiable character should not be impaired by new rules, tending to lessen their currency and credit. *Henry v. Flagg*, 13 Met. 64. *Ferry v. Ferry*, 2 Cush. 92. *Sparhawk v. Wills*, 6 Gray 163. *The City v. Lamson*, 9 Wallace 477."

Among the authorities which have taken up the issue of holder in due course are two decisions of this Court, both of which cited and approved the *Kirby case, supra:*

Cromwell vs. County of Sac, 96 U. S. 51 (1877);
Railway Co. vs. Sprague, 103 U. S. 756 (1880).

Thus in the *Cromwell case*, this Court, after upholding the *Kirby case*, said:

"To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually."

In the *Sprague case*, there is the following language by this Court:

"This point has been expressly ruled by this Court in *Cromwell vs. County of Sac*, 96 U. S. 51. In that case, the court, speaking by Mr. Justice Field said: '*The non-payment of an instalment of interest when due could not affect the negotiability of the bonds* or of the subsequent coupons. Until their maturity a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities.' To the same effect see *National Bank of North America vs. Kirby*, 108 Mass. 497, and Boss vs. Hewitt, 15 Wis. 260." (Italics supplied.)

In the case of

Vermilye & Co. vs. Adams Express Co., 88 U. S. 138 (1874),

there were involved instruments due in three years with interest payable semi-annually. This Court held:

> "*They had the ordinary form of negotiable instruments,* payable at a definite time, and that time had passed and they were unpaid. * * * These were simply notes, *negotiable it is true,* having when issued three years to run, which three years had long expired, and the notes were due and unpaid." (Italics supplied.)

Likewise in

Morgan vs. United States, 113 U. S. 476 (1884),

long term bonds with interest payable semi-annually were held to be meant to pass as money, in the following language:

> "These beneficial results were greatly facilitated, if not made feasible, by the *unquestioned negotiability* of the called bond, which, when subjected to the right of redemption reserved by their terms were therefore considered and treated as equivalent to money." (Italics supplied.)

Although the above-mentioned cases, which were in this Court, involved instruments with interest coupons attached, this played no part in the decision other than to show the existence of knowledge of the default in interest.

A complete review of all the authorities on the holder in due course issue is contained in

Barbour vs. Finke, 47 S. D. 644, 201 N. W. 711 (1924).

Among the cases there cited are the decisions of this Court just referred to and 31 other cases representing 16 states, all of which sustain the conclusion reached in the *Bank vs. Kirby case.*

In addition to this last mentioned line of cases the following are but a few of many cases in which the instru-

ments provided for periodical interest before maturity and yet they were treated as negotiable instruments without any question:

Utah State Nat. Bk. vs. Smith, 180 Cal. 1,179 Pac. 160 (1919);

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Wheaton vs. Pike, 9 R. I. 132 (1868);

Continental Etc. Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Wagner vs. Benjamin, 120 Wash. 532, 207 Pac. 1045 (1922).

On the basis of the authorities, therefore, it must be concluded that the provision for the periodical payment of interest before maturity does not affect negotiability.

(b) Interest on interest at a higher rate.

The following decisions expressly hold that interest on interest does not prevent instruments from being negotiable:

Lister vs. Donlan, 85 Mont. 571, 281 Pac. 348 (1929);

Continental Bank vs. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927);

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911).

Thus, in *Lister vs. Donlan, supra*, the Court held a note is negotiable which "bears interest at six per cent per annum, payable annually, and contains this clause: 'Interest or principal not paid when due to draw interest thereafter at ten per cent per annum until paid.' "

Similarly, in *Continental Bank vs. Jefferson, supra,* there was a provision for interest on interest at a higher rate. A note dated March 1, 1923, and providing as follows, was held negotiable:

> "March 1, 1924, after date, without grace, I promise to pay to the order of....$7,500.00....with interest at the rate of 8 per cent per annum, payable semi-annually, from date until due.
>
> "Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 10 per cent per annum, payable semi-annually, until paid. * * *"

In upholding the negotiability of the note, the Supreme Court of South Dakota said:

> "In a note in this form, if the maker complies with his contract, there is no question about the amount necessary to pay the note at maturity, and if he does not so comply the matter is one of simple computation."

In *Barker vs. Sartori, supra,* the note provided for interest on interest and, in upholding its negotiability under the Negotiable Instruments Act, the Supreme Court of Washington said:

> "It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money."

A prior decision by the Circuit Court of Appeals of the Third Circuit has held that interest payable semi-annually with a higher interest rate on unpaid interest does not render a note non-negotiable:

DeHass vs. Roberts, 70 Fed. 227, 229 (C. C. A. 3rd, 1895).

The Court there said:

> "The note and coupons are mercantile instruments, not only according to the law of Kansas, by which the parties bound themselves, but according to

> the law merchant as well; and we deem it unnecessary to add anything to what the court has so well said on the subject."

It is true that in that case there was involved a note with coupons attached, but, as it has been pointed out above, this fact is irrelevant where the issue is simply whether the instrument is a negotiable one.

One case which might, at the first blush, seem to oppose the cases upholding the negotiability of these notes is

First National Bank vs. Bosler, 297 Pa. 353, 147 Atl. 74 (1929), infra pp. 25-29.

The basis of that decision, however, was not an objection to interest on interest at a higher rate, but rather an objection to the language used in the particular instrument there involved because, as stated by the Court,

> "The present note has, therefore, two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear eight per cent *until fully paid*, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity."

Counsel has found no case which has held that negotiability is impaired by a provision for interest on unpaid interest at a higher rate. There is a *dictum* in the case of

Sharpe vs. Shoenberger, 44 S. D. 402, 184 N. W. 209 (1921),

where the Court stated that the note in suit would be non-negotiable if it were more than a six month note, because in that event the provision for interest upon interest at a higher rate before maturity could become operative. This *dictum*, however, was urged upon that same Court in a later case,

Continental Bank v. Jefferson, 51 S. D. 477, 215 N. W. 533 (1927),

and in the following language was repudiated:

> "In this view we are unable to agree with appellant. It is true that there is a statement in Sharpe v. Shoenberger, 44 S. D. 402, 184 N. W. 209, which would sustain this view. However, in the Shoenberger case the term of the note was 6 months only, and any statement as to the negotiability of the note, if it had been payable more than 6 months after its date, was dictum only, and that dictum we now disapprove."

The rule is stated as follows in

1 Daniel on Negotiable Instruments (7th ed. 1933) 66, 67:

> "But negotiability is not impaired if it provides that if the note is paid on or before maturity it shall not carry interest or shall bear interest at a lower rate, or if not paid when due it shall bear an increased rate of interest, or that *unpaid interest shall bear interest.*" (Italics supplied.)

It is thus seen that all the authorities are in accord in holding that instruments are negotiable notwithstanding provisions for periodical payments of interest before maturity, and for interest on unpaid interest at a higher rate.

3. On principle the instruments should be recognized as negotiable.

Dogma in the law on bills and notes is that an instrument to be negotiable must provide for a sum certain. The only difficulty in the formula is the meaning of a "sum certain". In other fields of the law it is said what a jury can render certain is certain. Manifestly, such is not the meaning of certainty as applied to negotiable instruments. Its actual meaning can only be gathered from a study of the cases. The following are examples of promises held to lack a sum certain:—

1. A certain sum "and all fines according to rule", *Ayrey vs. Fearnsides,* 4 M. & W. 168 (1838);

2. A certain sum and also "all other sums which may be due", *Smith vs. Nightingale,* 2 Stark. 375 (1818);

3. A sum certain "with exchange", *Lowe vs. Bliss,* 24 Ill. 168 (1860). CONTRA: *Smith v. Kendall,* 9 Mich. 241 (1861); *Negotiable Instruments Act §2 (4).*

4. A sum certain together with all costs of collection including attorney's fees, *Jones vs. Rodatz,* 27 Minn. 240 (1880). CONTRA: *Farmers National Bank vs. Sutton Mfg. Co.,* 52 Fed. 191 (C. C. A. 6th, 1892); *Negotiable Instruments Act §2 (5).*

An examination of these cases inevitably leads to the conclusion that certainty of sum as used in regard to negotiable instruments means *commercial* and not *mathematical* certainty. This conclusion was stated in

Cudahy Packing Co. vs. State Nat. Bank, 134 Fed. 538, 542 (C. C. A. 8th, 1904)

as follows:

"The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law.

> It requires commercial, not mathematical certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not be regarded by the Courts."

With this background it is easier to approach the various contentions raised as to the negotiability of the instruments.

(a) Interest in installments before maturity.

Upon analysis, an instrument with interest payable in installments is no different from an instrument with principal payable in installments. In either case, the instrument may or may not show whether an installment has been paid. That, however, is not the kind of uncertainty which prevented negotiability under the law merchant. The courts in England as well as in the United States have time and again ruled in favor of the negotiability of instruments in which principal was payable in installments:

Oridge vs. Scherborne, 11 M. & W. 374 (Eng. 1843);

Carlon vs. Keneally, 12 M. & W. 139 (Eng. 1843);

Gillette vs. Hodge, 170 Fed. 313 (C. C. A. 8th, 1909).

The Negotiable Instruments Act itself codifies the law merchant on this point, and expressly provides that a sum is certain even though payable in installments. It also clearly recognizes that interest in installments before maturity does not impair negotiability. The following provision is in the

Negotiable Instruments Act, (Florida Laws 1897 C 4524; Comp. Gen. Laws 1927, secs. 6760-6929):

> "*Sec. 2. Certainty as to Sum: What Constitutes.* The sum payable is a sum certain within the meaning of this Act, although it is to be paid:
>
> (1) With interest; or
>
> (2) By stated installments; or
>
> (3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; * * *"

Subdivision (3) obviously recognizes the payment of interest in installments because that is the only way that there could be a default in the payment of interest before the whole becomes due. Likewise subdivision (2), in providing for payment in installments, refers to interest as well as principal. It was so held in

Barker vs. Sartori, 66 Wash. 260, 119 Pac. 611 (1911),

where the court said:

> "The fact that the interest was payable in installments does not render the notes uncertain, for the statute expressly provides that payment may be made by installments. This applies as well to interest as to principal."

No valid reason exists for a distinction between interest and principal on this score and, therefore, it is submitted that a provision for the payment of interest in installments prior to maturity of principal does not on principle impair negotiability.

(b) Interest on interest at a higher rate.

There are two supposed objections to this provision: (1) Interest on interest causes uncertainty; and (2) Interest at a higher rate raises an ambiguity. These objections will be considered in order.

(i) Interest on interest.

Just as the right to charge interest finally found a place in the common law, so the right to charge compound interest came to be recognized. An excellent historical study in which the Court came to the conclusion that compound interest in a bond is not usurious is seen in

Pawling's Ex'rs vs. Pawling's Adm'rs, 4 Yeats 219 (Pa. 1805).

The rationale of the decision is the common sense remark of Lord Thurlow in *1 Ves. jr. 99, 133* that

> "I am in favor of interest upon interest, because I do not see any reason, why, if a man does not pay interest when he ought, he should not pay interest upon that also".

The real difficulty encountered by courts was the right to interest on interest when there was no bargain for it. In the early case of

Wheaton vs. Pike, 9 R. I. 132 (1868),

interest on interest, due before maturity of principle, was allowed even though not expressly provided for.

In the case at bar, however, such a problem does not arise since the notes expressly provide for interest on interest. Compound interest is not only commercially certain but also mathematically certain. No objection to negotiability, therefore, can be raised on that score. A concise statement of this conclusion is seen in

Brown vs. Vossen, 112 Mo. App. 676, 87 S. W. 577 (1905),

where an instrument was held negotiable in the following language:

> "The note here is for a certain sum with compound interest. There is nothing indefinite, contingent or uncertain in its terms. It provides that if interest was not paid when due, such interest should, thence on, it-

self draw interest. There can be no valid objection to such provisions in the law merchant."

It must be concluded, therefore, that interest on interest is simply a common sense practice which creates neither commercial nor mathematical uncertainty. The provision for a higher rate after maturity is just as certain and, by giving an incentive for prompt payment, aids negotiability.

(ii) Interest at a higher rate in reference to ambiguity.

a) Ambiguity does not prevent negotiability.

If it is assumed that there is an ambiguity because the instrument does not indicate whether the higher rate of interest is to begin to run from the time there was default in interest, or from the maturity of principal, the negotiability of the note is not impaired.

Chitty on Bills and Notes, *150,

has made this statement as to ambiguity:

> "Where there is a *contradiction, ambiguity,* or *uncertainty* in the terms of the instrument, it may, especially against the party making or negotiating it, be so construed as to give effect to it according to the presumed intention of the parties".

A reason for the rule is seen in the following statement by this Court in

Cox vs. National Bank, 100 U. S. 704, 715 (1879):

> "Bills of exchange, like other written instruments, are subject to legal construction in order to ascertain the intent and meaning of the parties, unless the language employed to express such intent and meaning is clear and unambiguous."

The obviousness of this statement is seen by an examination of the Negotiable Instruments Act itself, which

expressly provides in Section 17 for various rules of construction where an instrument is ambiguous. Thus, in the case of

Acme Coal Co. vs. Northrup Nat. Bank, 23 Wyo. 66, 146 Pac. 593 (1915),

there was a conflict as to the rate of interest between handwritten and typewritten provisions. The Negotiable Instruments Act provided for the contingency only of a conflict between writing and printing. The Court had no difficulty whatsoever in holding that the instrument was negotiable and that the writing controlled. Similarly, in the case at bar, assuming there was ambiguous language, the Court can determine exactly what the instrument is supposed to mean, in which case there can be no doubt as to its negotiability.

One case has held that an ambiguity as to interest rate caused the instrument to be non-negotiable:

First Nat. Bank vs. Bosler, 297 Pa. 353, 147 Atl. 74 (1929),

However, the ambiguity in that case arose by virtue of different provisions in the rate of interest on *principal before* and *after* maturity, but not as to interest on unpaid interest, as in the case at bar. It should be noted that in that case the provision was that "deferred payments [and not "deferred *interest* payments," as in the case at bar] are to bear interest from maturity at ten per cent per annum semi-annually." This is clear from the following quotation from that case.

> "The present note has, therefore, two irreconcilable clauses, so far as concerns the interest payable after maturity; one specified in the clause that the debt is to bear eight per cent *until fully paid*, whether before or after maturity, and the other which states that the debt is to bear interest at ten per cent per annum after maturity" (Italics by the Court).

In accord with that case is a lower Court decision in New Jersey,

New Miami Shores Corp. vs. Dugan, 155 Atl. 262, affirmed on an entirely different ground in 160 Atl. 619.

A case involving the identical type of notes in the *Bosler* case, but reaching a directly opposite conclusion, is

Lessen vs. Lindsey, 238 App. Div. 262, 264 N. Y. Supp. 391 (1933).

Not only is the *Bosler case* not pertinent to the issue in the case at bar, but for the reasons and authority given earlier, the *Bosler case* seems wrongly decided. This is the opinion of Dean Goodrich in an article,

Certainty in Negotiable Paper (1929), 2 Pa. Bar Ass'n Quart. 10, 13,

in which he criticizes the case in the following language:

> "The actual basis of decision is thus a very narrow one, that the inconsistency in the language destroyed negotiability by rendering the amount uncertain. Is that exactly the difficulty? Is the uncertainty in this case in the amount which the maker has promised to pay, or is it in determining from the language used just what he is promising? If the first, the instrument may be a good contract but is no promissory note. This is shown by such decisions as the Massachusetts citation in the opinion, a promise to pay 'with interest the same as savings banks pay,' *Whitwell v. Winslow*, 134 Mass. 343, and in *Ayrey v. Feamsides*, 4 M. & W. 168, where the promise was to pay a given amount 'and all fines according to rule.'
>
> "But in the instant case, once the interpretation is straightened out, the promise is definite enough. If the provision for higher interest on deferred payments prevails, the instrument falls within the line of cases cited above. If it is to be thrown out because it is contradictory to the 'until paid' clause, then the promise is obviously definite enough. Ambiguities do not necessarily invalidate negotiability: Section 17 of the

Negotiable Instruments Law provides rules of construction for dealing with some of them. The question here seems the same as that in any other contract where the parties have not clearly expressed themselves. Williston on Contracts, Sec. 624, states: 'If, however, the first clause is general in terms, and the latter is particular, or the latter clause is repugnant only to part of the earlier, it seems that the latter clause would be given full effect, and the earlier subjected to such qualifications as the latter might make necessary.' Applied to this instrument, such a rule would require one rate of interest prior to default, the higher rate thereafter. Or, if the rule of construction were adopted that disregards a rejection of later language inconsistent with that earlier expressed, as shown in *Straus v. Wanamaker,* 175 Pa. 213, 226, the provision for the higher rate would be rejected. Under either alternative, the promise, as interpreted, would be definite."

In a later decision of the Supreme Court of Pennsylvania,

International Fin. Corp. vs. Phila. Whse. Drug Co., 312 Pa. 280, 284 (1933),

Kephart, J., in speaking for the Court, says:

"The paper travels as 'a courier without luggage' until this presumptive freedom of transferability is clearly and definitely restrained by its own evident limitations; *mere words of ambiguity will not restrain its course.*" (Italics supplied.)

A thought to be kept in mind is that it has been held time and again that if two constructions of an instrument are possible, the court should adopt the one in favor of negotiability:

Williamson vs. Craig, 204 Iowa 555, 215 N. W. 664 (1927).

If an instrument is so ambiguous that no single meaning possibly can be ascribed to it, then it should be inopera-

tive and no question of non-negotiability would arise because the court should not strike a bargain for the parties. If, however, there is only an apparent ambiguity, which would leave the court or any reasonable person with but one real meaning as to what was intended, notwithstanding conflicting phrases, the court should give effect to the obvious intent of the parties as to both meaning and negotiability.

b) The interest at a higher rate does not cause any ambiguity.

It will be recalled that the exact provisions of the notes in suit provide as to interest on interest as follows:

> "Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

"Deferred interest payments" can only mean interest which has become due but remains unpaid. It is this unpaid interest which is to bear interest at a higher rate "from maturity." Respondent has contended that the word "maturity," as used here, creates an ambiguity. The basis of this contention, as stated by the Respondent in the Brief in Opposition to Petition for Writ of Certiorari, is as follows:

> "'Maturity' when applied to commercial paper means the time when the principal sum of a bill or note becomes due and demandable."

The correctness of this as a general statement is conceded, but in this case "maturity" is not being applied to "commercial paper"—it is being applied to "deferred interest payments." "Deferred interest payments" has a specific meaning. "Maturity" is a general term—it can refer to the due date of any contractual obligation or to the due date of anything else. A familiar and common sense rule of construction, the doctrine of *ejusdem generis,* is

applicable here. The general term, "maturity" refers to the specific term preceding it, "deferred interest payments." The meaning, therefore, must be that unpaid interest is to bear a higher rate of interest from the time that the interest becomes due.

The meaning of the notes, as shown above, is not determined by nor dependent on extrinsic circumstances. The meaning is simply determined by an obvious construction of their provisions. The notes, therefore, do provide for a sum certain.

It has been shown that, as a matter of commercial practice, legal authority and principle the interest provisions of the notes in suit do not destroy their negotiability, and, therefore, on that ground, the judgment of the Circuit Court should be reversed.

B.

THE LOWER COURT WAS BOUND TO FOLLOW THE FLORIDA SUPREME COURT'S INTERPRETATION OF THE FLORIDA NEGOTIABLE INSTRUMENTS ACT.

A second ground on which the lower Court should be reversed is that, in determining the negotiability of Florida contracts, it refused to apply a decision of the highest court of Florida which interpreted the Florida Negotiable Instruments Act.

The Circuit Court of Appeals made the following ruling, which controlled its final decision (R. 23):

> "The construction given by state courts of last resort to state statutes which are merely declaratory of the common law or of the law merchant, does not bind federal courts."

It is submitted that the Court below erred for two reasons. These will be considered separately.

1. The Judiciary Act compels federal courts to follow State statutes and the construction thereof adopted by the highest court of the State.

(a) The decision of the Circuit Court is an unprecedented extension of the doctrine of Swift vs. Tyson.

The Judiciary Act, Section 34, provides as follows:

> "* * * the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Judge Story, in his far-reaching opinion in

Swift vs. Tyson, 16 Pet. 1, 18 (1842),

stated:

> "In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of section 34 limited its application to state laws strictly local, that is to say, *to the positive statutes of the state, and the construction thereof adopted by the local tribunals,* and to rights and title to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character * * *" (Italics supplied).

The holding of *Swift vs. Tyson* has been subjected to rigorous attacks in this Court. An examination of these decisions shows the exact scope of the doctrine of *Swift vs. Tyson.* Thus in

Mercer County vs. Hackett, 68 U. S. 83, 96 (1863),

this Court, in refusing to follow a Pennsylvania decision that bonds were not negotiable, reiterated the doctrine of *Swift vs. Tyson* and said, as to the Pennsylvania decision:

> "If this decision of that learned court was founded on the construction of the constitution or *statute law of the State* or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow it." (Italics supplied).

In

Railroad Company vs. National Bank, 102 U. S. 14, 31 (1880)

this Court reaffirmed *Swift vs. Tyson* with this language:

> "The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract there made, are not *in exposition of any legislative enactment of that State*" (Italics supplied).

Finally, in the case of

Burgess vs. Seligman, 107 U. S. 20, 33 (1882),

this Court, apparently growing tired of continual attacks on the doctrine, went out of its way to state the rule with such precision as to leave no doubt about the matter. Thus, after deciding that a state decision is not binding if rendered after the controversy arose, the Court stated the precise rule as follows:

> "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property *and action* in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate *and the construction of State constitutions and statutes.* Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is" (Italics supplied).

It must be remembered that *Swift vs. Tyson* dealt with the negotiability of a note under the law merchant. No statute was involved. In deciding that the federal court would determine for itself the negotiability of the note, Judge Story expressly stated, as seen in the quotation above, that the rule would be *otherwise* if a *statute* were involved. That has always been the construction of Section 34 adopted by this Court, as evidenced by the cases discussed above and by the following quotation from a recent opinion of this Court written by Mr. Justice Holmes:

> "* * * no case yet has gone the length of undertaking to correct the construction of State laws by State courts. The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of those laws by the Supreme Court of the State is as much the act of the State, as the enactment of them by the legislature."
>
> **Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 199 (1926).**

Notwithstanding the clear and unequivocal language of this Court, the Court below held that a State statute, as interpreted by the highest court of the State, need not be followed if the statute was a *declaratory* one.

Several Circuit Courts of Appeals have reached conclusions which are exactly opposite to the decision of the Court below in the instant case.

In the Fourth Circuit Court of Appeals, there is an express holding that the Federal Court was bound by a decision of the Supreme Court of North Carolina construing the Uniform Negotiable Instruments Act adopted in that State:

Savings Bank vs. National Bank of Goldsboro, 3 F. (2d) 970 (C. C. A. 4th, 1925).

Thus, it was there held (at page 973):

> "In such cases, the views and interpretation placed by the state's highest court upon its own statutes, passed within the inhibitions of the federal constitution, *will be accepted and followed, although questions of commercial law and jurisprudence may be involved* or incidentally arise * * *" (Italics supplied).

The position of that Court was recently re-affirmed in the case of

Niagara Fire Ins. Co. vs. Raleigh Hardware Co., 62 F. (2d) 705 (C. C. A. 4th, 1933),

where the Court said (at page 708):

> "The duty of the federal courts to follow state decisions in the interpretation of state statutes is too well settled to admit of serious discussion. The rule has been followed, not only with respect to statutes dealing with local matters, but also with respect to those affecting general commercial law, such as the Negotiable Instruments Law, which was dealt with in the case of Savings Bank of Richmond v. National Bank of Goldsboro, *supra*."

It is interesting to note that this Court denied a petition for certiorari to the Circuit Court of Appeals for the Fourth Circuit, in which petition this issue was raised:

Bank of United States vs. Cuthbertson, U. S. Sup. Ct., Oct. T. 1933 No. 691, affirming 67 F. (2d) 182 (C. C. A. 4th, 1933).

But, as above indicated, the Fourth Circuit is in accord with the view now presented. Therefore, if any significance is to be given to that denial of certiorari, it must be considered as an approval of the rule of the Fourth Circuit.

In the Circuit Court of Appeals for the Seventh Circuit in

Phipps vs. Harding, 70 Fed. 468 (C. C. A. 7th, 1895),

the issue arose as to the effect which must be given in Wisconsin to an anomalous indorsement on a note delivered in Massachusetts. The Court, in treating the law of Massachusetts as governing the transaction, held with regard to the construction of a statutory provision governing anomalous indorsement (at p. 472):

> "The statute was thus construed by the supreme judicial court of that commonwealth in Bank vs. Law, 127 Mass. 72, prior to the execution of the contract in question. We are, of course, bound by that construction."

In the Circuit Court of Appeals for the Eighth Circuit in

Kobey vs. Hoffman, 229 Fed. 486 (C. C. A. 8th, 1916),

suit was brought in Kansas and the question involved was the negotiability of a note executed and made payable in Missouri. The Court said (at p. 488):

> "The Missouri Negotiable Instruments Law has never been construed by the Court of last resort of that state. We must therefore determine for ourselves

how this statute should be construed. As the Negotiable Instruments Law, on that point, is practically a reaffirmance of the law merchant, the decisions of the Supreme Court of the United States control this court *until the highest court of the state—in this case that of Missouri—construes it,* and then it will only be authoritative on the courts of the United States as to notes and bills executed thereafter" (Italics supplied).

It should be noted that in the case at bar the Court below, in reaching a conclusion contrary to all the authorities set out above, relied on authority as follows:

"Mutual Life Ins. Co. v. Lane, 151 Fed. 276, affirmed 157 Fed. 1002, certiorari denied 208 U. S. 617. Capital City State Bank v. Swift, 290 Fed. 505. Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88. Jackmus v. Clausen, 47 F. (2d) 766."

But it must be noted that among these purported authorities, there is no direct appellate decision which supports the position of the Court below. Thus, in the case of

Mutual Life Ins. Co. vs. Lane, 151 Fed. 276, affirmed under the name of Alexander vs. Lane, 157 Fed. 1002 (C. C. A. 5th, 1907) and certiorari denied, 208 U. S. 617 (1908),

cited as authority by the court below, a *per curiam* opinion of one sentence by the Circuit Court of Appeals for the Fifth Circuit affirmed the lower court on the basis of two other cases that have nothing whatsoever to do with the problem in the instant case. This *per curiam* opinion did not even mention the problem here involved. It is also significant that in the petition for certiorari in that case, which was denied by this Court, the question herein stressed was not even raised.

In the case of

Peterson vs. Metropolitan Life Ins. Co., 19 F. (2d) 74, affirmed 19 F. (2d) 88 (C. C. A. 8th, 1927),

also cited by the Court below as authority, it was expressly conceded in the Circuit Court (at page 90) that the note was *non-negotiable* under the Uniform Negotiable Instruments Law of Iowa, and, therefore, there was no discussion of the issue involved in the case at bar. On the contrary the position of the Eighth Circuit on this question is clearly set forth in *Kobey vs. Hoffman, supra,* and is just diametrically opposite.

The other two references made by the Circuit Court are to *dicta* in District Court decisions, wherein it was unnecessary to determine the issue here involved.

In still other decisions, the Federal Courts have expressly refused to decide the question:

Forrest vs. Safety Banking & Trust Co., 174 Fed. 345, 348 (E. D. Pa. 1909);

> "How far a federal court would be bound by the decision of a state court that construed a statute occupying the peculiar position of the Negotiable Instruments Act—that is to say, attempting to codify and make uniform the rules that govern an important topic of general commercial law—presents an interesting question, upon which no opinion need now be expressed."

or have equivocally answered the problem as in

Smith vs. Nelson Land & Cattle Co., 212 Fed. 56, 62 (C. C. A. 8th, 1914):

> "We place our decision upon the statutes of Kansas as construed by the Supreme Court of that state, and as we construe them."

This survey of the foregoing cases reveals the complete lack of appellate court authority in accord with the lower court. There are, however, various cases which upon

a cursory glance might appear to support the position of the lower court. One of the most confusing cases on this score is probably

Watson v. Tarpley, 59 U. S. 517 (1856).

In that case, suit was brought by a resident of Tennessee in a federal court in Mississippi against a drawer of a bill of exchange which was drawn against a party in Louisiana. Upon refusal by the drawee to accept, and due notice of protest, suit was started. The lower court charged that the plaintiff would have to prove non-payment. It was suggested to this Court that the basis of the lower court's charge was a Mississippi statute prohibiting suit on a bill of exchange until its maturity. This Court held that the charge was improper because the Mississippi *statute* could not bar rights of a person not domiciled in that jurisdiction, and said:

> "The statute of Mississippi, so far as it may be understood to deny, or in any degree to impair the right of a non-resident holder of a bill of exchange, immediately after presentment to, and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative."

The Court there was not concerned with the effect that must be given to a state decision but rather the effect to be given a state statute. No one doubts that a State by statute can change the general commercial law existing therein but an entirely different issue is raised where, as in the case just mentioned, there is an attempt to give an extra-territorial effect to the statute by denying access to domestic courts in a given situation.

There must also be distinguished from the case at bar various lines of cases which are apt to be a cause of confusion. First there is the line of cases where no state

statute enters the picture. Decisions under such circumstances are merely expository of *Swift vs. Tyson*, as pointed out in the cases mentioned above. To that list of cases can be added,

Goodman vs. Simonds, 61 U. S. 343 (1858).

Closely allied to these cases are cases where there is a state statute but the issue involved is not a construction of the statute by the highest court of the state. *Watson vs. Tarpley, supra*, is an example of such a decision. Other examples are seen in

Oates vs. National Bank, 100 U. S. 239 (1879);
Cudahy Packing Co. vs. State Nat. Bank, 134 Fed. 538 (C. C. A. 8th, 1904);

where the statute mentioned is one comparable to the Statute of Anne in providing that notes come under the law merchant, but the issue involved state decisions which were not based on the statute. Since counsel for the Respondent have urged the *Oates* case upon the Court, it is interesting to point out the following language in that case (at p. 242):

> "It seems that upon this precise point there has been no direct adjudication by the Supreme Court of Alabama, *to which primarily belongs the duty of giving authoritative construction of the statutes of that State.*" (Italics supplied.)

Other cases which should not be confused with the instant case are those wherein the state decision was rendered after rights and obligations had accrued. Examples of such decisions are:

Burgess vs. Seligman, 107 U. S. 20 (1882);
Town of Newbern vs. National Bank, 234 Fed. 209 (C. C. A. 6th, 1916).

This analysis of the authorities makes it obvious that the lower Court, contrary to authority, has extended the

doctrine of *Swift vs. Tyson*. A further question is whether this extension is warranted to such a degree that this Court should permit it.

(b) The unprecedented extension of Swift vs. Tyson is unwarranted.

The time honored doctrine of *Swift vs. Tyson* has been criticized on the bases of historical research, modern conception of law in its philosophical sense, the self-centered personality of Judge Story, and statistics which have shown the part played by this decision in the overcrowding of the federal courts. None the less, *Swift vs. Tyson* is still the law. It must be remembered, however, that all the criticism and arguments against *Swift vs. Tyson* apply with even greater force against the extension of that doctrine. It is with this very thought in mind that Mr. Justice Holmes, in one of his dissenting opinions, indicated the attitude of this Court upon the extension of this doctrine by the following concise and pointed statement:

> "I should leave *Swift vs. Tyson* undisturbed, as I indicated in *Kuhn vs. Fairmount Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."
>
> **Black & White Taxicab vs. Brown & Yellow Taxicab, 276 U. S. 518, 535 (1928).**

The very cause of the rule of *Swift vs. Tyson* in so far as questions of general commercial law is concerned, does not apply where any kind of state statute is involved. The reason for that decision was the then existing conception of the common law as a perfect system of law under which one and only one correct answer to any legal problem was possible. In light of this conception, it was

but natural that a court of wider jurisdiction, more significance and greater powers, would make its own determination of what the common law was rather than follow the opinion of another court. However, this cause for the rule does not apply once a statute is involved because "the law" is that statute, and not the general principles of a "system of law".

Thus, although *Swift vs. Tyson* involved negotiable instruments, it was decided at a time when no state had any comprehensive statute governing negotiable instruments. But at present every state, including Florida, has seen fit to supplant general principles of commercial law by the adoption of a positive statute—the Negotiable Instruments Act. Though the Negotiable Instruments Act is to a great degree a codification of general commercial law principles, the various legislatures deliberately adopted this comprehensive statute to be the basis for deciding all questions of negotiable instruments. As a statute, it necessarily becomes the first and authoritative point of inquiry for determination of any problem the facts of which come within its scope. The statute has become the law of the state adopting it, regardless of the *precedent* the legislature followed in formulating it.

The Negotiable Instruments Act was created by legislative process, the same as any other statute. The mere fact that it is comprehensive and to a large extent an adoption of prior commercial law principles, does not take away its character as a "positive statute" designed to be the sole authority for future court decisions in the particular State. And whatever "construction" is placed on that statute by the highest tribunal of that State must be followed by the federal courts.

But under the Circuit Court's decision in the instant case different consequences will result depending upon the precedent followed by the legislature in formulating the statute. It may be suggested at this point that the decision of the Circuit Court raises a number of queries which themselves reveal the error in the decision: By whom, and by what test, is it to be determined whether a statute is merely declaratory of general law? Will this be determined by the federal court or by the state court? Will it depend on whether the statute itself says it is declaratory, or will it depend upon whether the particular provision looks like the rule which existed prior to the statute?

The Circuit Court of Appeals made no analysis of this problem, and it is submitted that as a result its very decision reveals what appears to be a *non sequitur*, if not an actual inconsistency. The Court held that (1) state decisions construing the Negotiable Instruments Act need not be followed by the federal courts because the statute was declaratory of the law merchant; and (2) under the law merchant the notes were not negotiable. The Court failed to take into consideration any of the decisions upon the question of the negotiability of these notes rendered under the Negotiable Instruments Act. These decisions, as pointed out *supra*, at page 12 *et seq.*, have held that the notes *are* negotiable. It follows, therefore, that if, as the Court below ruled, under the law merchant these notes were *not* negotiable, then the Negotiable Instruments Act is *not* declaratory of the law merchant. Conversely, if the Negotiable Instruments Act is declaratory of the law merchant, and under it the notes are held negotiable, it must follow that the notes *were* also negotiable under the law merchant. We submit, therefore, that since the reasoning of the Court

below is fallacious under either of the two possible alternatives, its conclusion is erroneous.

The public significance of the decision of the Circuit Court cannot be over-emphasized. In recent years, there have been great advances in the codification of the common law. Uniform laws have been adopted on diverse subject matters in all the states. One of the earliest and probably the most important of these laws is the Uniform Negotiable Instruments Act. If this decision of the Circuit Court is not reversed, its effect will be tremendous. In cases involving questions of bills and notes, sales, bills of lading, partnerships, stock transfers, and all the other subjects which have purportedly been unified, we will soon find the assertion of different law within the very same jurisdictional boundaries depending on whether a federal or a state court renders the decision. Such a condition would be especially deplorable in the field of bills and notes, the utility of which is based upon freedom in circulation, which in turn depends upon known legal rights that go with them.

It is for these reasons that a conclusion exactly opposite to that of the Circuit Court of Appeals is reached in two Law Review articles directly in point:

Fordham, the Federal Courts and the Construction of Uniform State Laws (1928) 7 N. Car. L. Rev. 423.

"Our conclusion is that the doctrine of Swift and Tyson should not be applied in the construction of uniform state laws. It is required neither by consideration of authority nor by policy."

Dobie, Seven Implications of Swift vs. Tyson (1930) 16 Va. L. Rev. 225.

"It is believed, therefore, that as a solution of the immediate problem the rule of compulsory con-

formity on the part of federal courts to the state construction of uniform state laws should be followed."

The instant case shows still another feature which makes the problem even more acute. The notes in suit were executed and delivered in Florida. They were also payable in Florida. Authorities all agree that under the rules of Conflict of Laws the law of Florida governs upon the question of the negotiability of these notes.

Restatement of Conflict of Laws, Proposed Final Draft No. 2, Sec. 360 (Am. L. Inst. 1931) states:

"The law of the place of contracting determines whether a mercantile instrument is negotiable."

If suit on a note is brought in a state court in any state of the Union, the rights of the parties are uniform because Florida law governs. But if suit is brought in a federal court in the same territorial boundary, opposite rights may prevail. This would place a litigant, whose claim is large enough to warrant federal jurisdiction and where there is a diversity of citizenship, in a position to change his substantive rights by choice of the forum, even though the law of the particular State, whose decisions ordinarily would govern the instrument in question, had been positively fixed by both statute and court interpretation. If suit were brought on a note in a state court of another state, the decision, following the law of the state where the instrument was made, might be one way, and if suit were brought or removed to a federal court sitting in the same state, the decision would be entirely different. No one would know what the rights of the respective parties are until litigation was completed. The Circuit Court has recognized the importance and necessity of certainty in so far as *the sum* is

concerned. But it appears that in its over-zealousness on that score the Court has overlooked the great importance of the certainty of *the law* which is to govern the rights of the parties.

For the reason, therefore, that this decision of the Circuit Court is an unprecedented and unwarranted extension of *Swift vs. Tyson* which is fraught with far reaching conconsequences preventing uniformity and certainty of law it is submitted that this Court should reverse it.

2. The Full Faith and Credit clause of the Constitution compels a federal court, in determining contractual rights created in a State, to apply State statutes and the construction thereof by the highest court of the State.

In 1912, the Supreme Court of Florida decided that under the Florida Negotiable Instruments Act, adopted in 1897 (Fla. Laws 1897 C 4524; Comp. Gen. L. 1927 §§ 6760-6929), certain interest provisions in a promissory note would not render it non-negotiable:

Taylor vs. American National Bank, 63 Fla. 631, 57 So. 678 (1912).

In 1925, the notes in suit, containing interest provisions similar to those in the case decided by the Supreme Court of Florida, were made, executed and delivered in Florida. They were also payable in Florida. Prior to maturity, without notice of any defects and for valuable consideration, they were negotiated. Then they were acquired by the plaintiff, a Florida corporation, for a valuable consideration. Upon suit on these notes, the District Court for the Eastern District of Pennsylvania and the Circuit Court for the Third Circuit refused to apply the aforesaid decision of the Supreme Court of Florida which had held these interest provisions would not render the notes non-negotiable. Under their own interpretation of the law merchant the federal courts below held the notes were *not* negotiable. Its refusal to apply the Florida decision, the Circuit Court said, was because the Florida Negotiable Instruments Act was a declaratory statute and not a statute which changed the law merchant (R. 23).

The opening section of

Article 4 of the United States Constitution

provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The question here is whether the Circuit Court has given "Full Faith and Credit" to the "public Acts, ... and judicial Proceedings" of the State of Florida.

It is, of course, no longer open to question that a federal court, like a State Court, must comply with the "full faith and credit" clause:

Bradford Electric Co. vs. Clapper, 286 U. S. 145 (1932).

This same case has reiterated the principle long ago adopted that full faith and credit must be given to State statutes. Since full faith and credit had to be given to statutes, it was but natural to hold that full faith and credit must be given to decisions interpreting those statutes:

Royal Arcanum vs. Green, 237 U. S. 531 (1915);
Converse vs. Hamilton, 224 U. S. 243 (1912).

A reason for this conclusion is seen in this statement by Mr. Justice Holmes in

Jones vs. Prairie Oil & Gas Co., 273 U. S. 195, 200 (1926):

"The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the legislature."

Then also there is this very forceful statement by Mr. Justice Field in the case of

Louisiana vs. Pilsbury, 105 U. S. 278, 294 (1881):

"The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred

under it are concerned, constitutes a part of the law as much as if embodied in it. *So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it.*" (Italics supplied.)

The notes in suit became binding obligations in accordance with the laws of Florida. The Circuit Court did not deny this. It held, however, that because the Florida Negotiable Instruments Act was *declaratory* of the law merchant, a federal court did not have to give the same effect to its construction as if it were a statute that *changed* the law merchant. Upon what does the Circuit Court base its distinction as to the effect that must be given to state statutes? In Florida the same effect is given to its statutes irrespective of the historical development or precedent behind the statute, and irrespective of whether the statute codified or changed its common law. It is submitted, therefore, that when the Circuit Court gave less effect to the Florida Negotiable Instruments Act because of a distinction which is not recognized in Florida the Circuit Court failed to give "*full faith and credit*" to a "*public act*" of the State of Florida.

The Circuit Court failed to give full faith and credit not only to a "public act", but also to "a *judicial proceeding*" of the State of Florida. The Florida Supreme Court had held similar notes negotiable under the Florida Negotiable Instruments Act. The Circuit Court expressly refused to follow the decision. This was in violation of the full faith and credit clause as stated by this Court in

American Surety Co. vs. Baldwin, 287 U. S. 156, 166 (1932):

"The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts."

The basis of petitioner's contention is not that the Circuit Court has erroneously *construed* the Florida Negotiable Instruments Act or decisions thereunder. If that were so, it is recognized that, as stated by Mr. Justice Brandeis by way of footnote in the recent opinion in:

Ohio vs. Chattanooga Boiler, 289 U. S. 439, 443 (1933):

"Had the question been merely the construction of the statute, no issue under the full faith and credit clause would have arisen."

Thus, in one of the cases cited for that proposition:

Banholzer vs. New York Life Ins. Co., 178 U. S. 402, 406 (1900),

this Court said:

"The ruling was a construction of the statute, *not a denial of its validity*, and that the court meant no more, and meant to follow, *not oppose*, the decisions of the State, is evident from its opinions." (Italics supplied.)

And, in another case, also cited by Mr. Justice Brandeis:

Pennsylvania Fire Ins. Co. vs. Gold Issue Min. & Mill Co., 243 U. S. 93 (1917),

this Court said:

"There is nothing to suggest that it was not candidly construing the Colorado statutes to the best of its ability, and, even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article 4, §1".

It will be noted that in the case at bar, as pointed out above, the issue is not whether the Circuit Court has *misinterpreted* the Florida Negotiable Instruments Act, nor is

it whether the Circuit Court has *misinterpreted* the Florida decisions construing the Florida Negotiable Instruments Act. The issue here is whether the Circuit Court erred in *refusing to follow* a decision which it expressly *recognized* settled the law in so far as Florida or a Florida Court was concerned.

Furthermore, Petitioner wishes to point out that under this argument it is not resorting to the "full faith and credit" clause in order to have this Court become a final arbiter of questions of *conflict of laws* even though it has been suggested that such a result is being approached by decisions of this Court:

> **Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. Law Rev. 533.**

In the instant case that position need not be taken. It is not contended that the Circuit Court has violated any principle of conflict of laws. The Circuit Court did not deny that Florida Law governs the substantive rights resulting from the negotiability of a note. The error of the Circuit Court, it is submitted, was committed when it decided that it could determine the question of negotiability for itself, and that it need not follow a Florida Supreme Court decision that interpreted the Florida Negotiable Instruments Act, giving as its reason a supposed distinction between declaratory and non-declaratory statutes, which distinction, as pointed out above, is not recognized in Florida.

Refusal by a federal court to give full faith and credit to a state decision interpreting a state statute because the statute is declaratory of the common law is not only a denial of a constitutional right, guaranteed by Article 4, § 1, but will have the effect of destroying the very purpose of these uniform statutes, which is to create uniformity in the law throughout the country. It is, therefore, urged that this is another reason why this Court should reverse the decision of the Circuit Court.

CONCLUSION.

The decision of the lower Court has rendered uncertain the negotiability of instruments which are in commercial use throughout the nation. Commerce has found these instruments especially expedient in two types of obligations—evidences of indebtedness secured by a mortgage and corporate debentures. The particular advantage of these instruments lies in their interest provisions. These give the obligations real worth as an investment by means of provisions for a periodical payment of interest before maturity of principal and by interest on interest at a higher rate if not paid when due.

It has been shown that the use of these instruments by the commercial world has been approved by the courts, and that the interest provisions create no obstacle to the commercial certainty which the law requires for negotiability. Cases before and after the Negotiable Instruments Act approve in law the adoption by the business world of instruments with such interest provisions.

Furthermore, interest provisions in the case at bar are fair, reasonable, and certain. Hypercriticism of the language used in the instruments has been resorted to in

order to set up a purported ambiguity. There is no ambiguity in these instruments, but even if that ambiguity did exist, it would not invalidate the negotiability of the instruments.

The necessity for certainty in sum as to negotiable instruments is more than matched by the necessity for certainty of the law governing such instruments. The purpose of the Negotiable Instruments Act and the rising tide of codifications in other fields of commercial law is to create such a certainty in business transactions. A decision of the highest court of a State interpreting such legislation and lending to it a final degree of certainty was within the contemplation of the legislature in passing the legislation. A similar view was within the contemplation of the federal legislature in enacting Section 34 of the Judiciary Act which compels federal courts to follow State law. Under the decision of the lower Court in the instant case, a final degree of certainty under any of these declaratory statutes is almost impossible. The law in a State court would be certain as soon as a decision of the highest court of the State was made, but the law in any federal court would not be certain until this Court spoke. Even then, unless the decision of this Court was in accord with that of the State court, there would be no certainty in the law governing the instrument because it could vary with the choice of jurisdiction. Hence the Circuit Court's decision is an unwarranted extension of the doctrine of *Swift v. Tyson*.

The rights and obligations herein involved were created on the faith of the law as set forth in the decisions of the highest Court of Florida interpreting the Florida Negotiable Instruments Act. Rights were transferred on the basis of that law. The lower Court nevertheless refused to follow that law merely because it was based on a statute which it termed declaratory of the law merchant. This re-

fusal to apply the State law because the statute was declaratory constituted a violation of the Full Faith and Credit clause of the Constitution.

It is submitted, therefore, that the decision of the lower Court should be reversed.

Respectfully submitted,

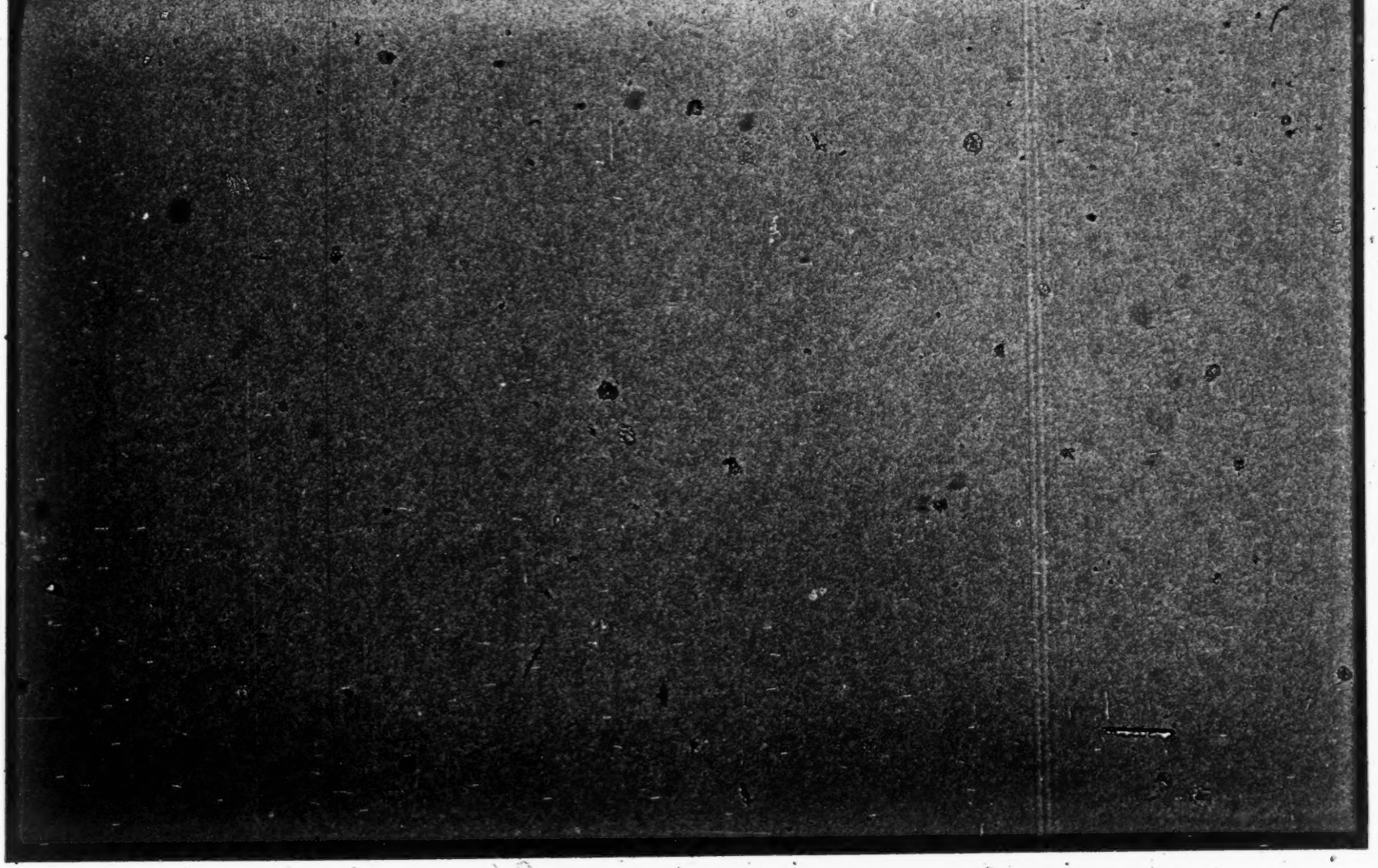
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 786.

Burns Mortgage Company, Inc.,

Petitioner,

v.

Erwin M. Fried,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

Two opinions were delivered by the United States District Court for the Eastern District of Pennsylvania, per District Judge Oliver B. Dickinson. An opinion Sur Statutory Demurrer was filed May 16, 1932 (R. 15) and an opinion Sur Motion for Re-argument was filed October 10, 1932 (R. 20).

The Circuit Court of Appeals for the Third Circuit delivered an opinion written by Circuit Judge J. Whitaker Thompson, filed on September 19, 1933 (R. 34). No opinion was delivered in the denial of a rehearing on November 15, 1933 (R. 57). The decision of the Circuit Court of Appeals is reported in 67 F (2d) 352.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938), as stated in the Petitioner's Brief.

RESPONDENT'S STATEMENT OF CASE.

Petitioner brought suit in the United States District Court on six promissory notes given by Respondent in 1925 to Golden Isles Corporation for a consideration to be furnished by said Golden Isles Corporation. The consideration was never furnished. Petitioner, claiming to be the transferee, after maturity, of a holder in due course, sued on said notes in Petitioner's own name.

Each of the notes contains the following provision:

> "* * * With interest thereon (the principal sum) at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

The Respondent interposed an Affidavit of Defense raising questions of law in which he averred that the suit was improperly brought in the name of the Petitioner for the reasons, among others: (1) that the Petitioner could not sue in its own name since the notes were transferred to it after maturity; and (2) that the notes were non-negotiable, that the Petitioner who claimed title through the endorsement by the payee, was merely an assignee, and that, therefore, under Pennsylvania procedure the Petitioner could not sue in its own name, but only in the name of the assignor to its use.

The District Court, Dickinson, *J.*, reached the conclusion that under the procedural law of Pennsylvania there was in the Petitioner no right of action and accordingly ruled that:

(1) The obligations sued upon were not negotiable instruments under Pennsylvania law.

(2) The Statement of Claim disclosed no legal right of action in the Petitioner.

The Petitioner moved for a re-argument, which, after rehearing, was denied, and the District Court entered a judgment of *non pros* in favor of the Respondent, the Petitioner having declined to avail itself of the opportunity given it to amend by suing in the name of the payee to its use.

In an opinion by Thompson, *C. J.*, the Circuit Court of Appeals affirmed the judgment of the District Court, following the rule established in Swift *v.* Tyson, 16 Pet. 1, and applying general principles and doctrines of commercial jurisprudence (R. 36). In applying said principles and doctrines, the Circuit Court held the notes in question non-negotiable because of the uncertainty as to the amount due thereon (R. 38).

A petition for rehearing was denied by the Circuit Court of Appeals (R. 57).

ARGUMENT.

It is respectfully submitted that a Writ of Certiorari should not be granted for the following reasons:

1. THIS COURT HAS ALREADY RULED IN A SIMILAR CASE THAT A WRIT OF CERTIORARI WILL NOT BE ISSUED TO DETERMINE WHAT LAW SHOULD HAVE BEEN APPLIED BY A CIRCUIT COURT IN PASSING UPON THE NEGOTIABILITY OF A WRITTEN INSTRUMENT.

In *Bank of United States* v. *Cuthbertson,* U. S. Supreme Court, Oct. Term, 1933, No. 691, this Court, on February 5, 1934, declined to review the question whether the Negotiable Instruments Law of the State of Illinois should be regarded as a local statute and therefore binding upon the Federal Courts. In that case, reported in 67 F (2d) 182, the Circuit Court of Appeals for the Fourth Circuit had held an instrument non-negotiable, without indicating what law had been applied, but citing cases to support its decision from Georgia, Kentucky, and the United States Supreme Court, although the notes there under consideration were given in North Carolina and assigned

in Illinois, in both of which states the Uniform Negotiable Instruments Act had been passed. Disregarding the argumentative assertions of the parties in the Briefs filed in said case, the sole question presented to this Honorable Court at that time was whether the Circuit Court of Appeals had applied the proper law in deciding the question of negotiability.

The following statement of the "Reasons Relied on for the Granting of the Writ" as presented in the Petition for Writ of Certiorari in *Bank of United States* v. *Cuthbertson, Trustee, etc. supra*, is most significant. (Page 9 of Petitioner's Brief in said case.)

> "1. The Circuit Court of Appeals has decided an important question of Federal Law, which has not been but should be settled by this Court and on which there are various conflicting decisions by Circuit Courts of Appeal. The matter involves an important rule of decision in the administration of law by a Federal Court. *The specific question involved is whether the Federal Courts in construing a state Negotiable Instruments Law are bound to follow the decisions of the highest court of that state.*
>
> "2. If the Negotiable Instruments Law is regarded as a local statute, then the Circuit Court of Appeals erred in deciding that the bonds were non-negotiable as this decision is probably in conflict with applicable decisions of the Supreme Court of the State of Illinois.
>
> "3. If the Negotiable Instruments Law is to be regarded as a general law and the law merchant applies, then the Circuit Court of Appeals has erred in deciding an important question of general law in a way probably untenable and in conflict with the weight of authority, as well as in conflict with other Circuit Courts of Appeal and this Court." (Italics ours.)

In dismissing the Petition for Certiorari, this Honorable Court, of necessity, declined to review the question as to what law should have been applied. In the instant case, the argument advanced under (1) above is repeated. (Petitioner's Brief, p. 2:) The question thus presented is, therefore, precisely the same as was passed upon by this Honorable Court on February

5, 1934. It is respectfully submitted that the ruling dismissing the Petition for the Writ in Bank of United States *v.* Cuthbertson, Trustee, should be followed in the instant case.

2. No Special Reason Exists for Disregarding Settled Principles and Granting a Writ of Certiorari.

It is well settled that a writ of certiorari to review a judgment of a Circuit Court of Appeals should be reserved for weighty and serious matters; it is also well settled that it is a branch of the Supreme Court's jurisdiction which should be exercised sparingly and with great caution. *Ex Parte Lau Ow Bew*, 141 U. S. 583; *Ex Parte Woods, et al.*, 143 U. S. 202.

The Petitioner contends that the instant case is of considerable moment, in that the rights of many holders of similar notes are involved. It is submitted that rights of many holders of similar notes were also involved in *Swift* v. *Tyson, supra*, in *Bank of United States* v. *Cuthbertson, supra*, and in every decision in which written instruments were ever declared non-negotiable. The rights of other persons are always incidentally affected by a judicial decision, but that reason, of itself, is insufficient to warrant a departure from settled principles governing the issuance of certiorari. It is therefore submitted that the instant case is not unusual and is of no more general interest and importance than any other interesting point of law. To a litigant, his case is always important, but his misconception of its importance should not be controlling upon this Court.

3. The Decision of The Circuit Court is a Logical Application of The Rule of Swift v. Tyson, and is in Line with Many Applications of That Rule by This Honorable Court.

In the classic case of *Swift* v. *Tyson*, 16 Pet. (U. S.) 1; 10 L. Ed. 865 (1842), the Supreme Court was called upon to decide whether, in determining the status of a holder of negotiable paper, it was bound to follow the law of the state of New York to the effect that a pre-existing debt was not sufficient consideration to make the one taking such an in-

strument a bona fide holder. This Court, per Story, *J.*, held that it was not bound to apply the law of the state of New York, but to decide whether sufficient consideration existed according to the general principles of commercial law. In so deciding, this Court, in discussing Section 34 of the Judiciary Act of 1879, ch. 20 (referred to in Petitioner's Brief, pp. 3, 6, 17), stated at page 18:

> "It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, *and especially to questions of general commercial law,* where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, *and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.* Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. *The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke* v. *Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world."* (Italics ours.)

Although almost one hundred years have elapsed since this pronouncement, a faithful adherence to the principles enunciated

in Swift *v.* Tyson is well illustrated by this Court's application of the rule in the following cases:

1. WATSON v. TARPLEY, 18 How. 517, 15 L. Ed. 509 (1856).

In an action by a payee against the drawer of a bill of exchange, it appeared that drawee had not accepted the bill, whereupon the payee protested and gave notice of such fact to drawer. The drawer, however, set up the defense that a statute of the state of Mississippi, forbade action unless notice of non-presentment and non-payment *at maturity* were given. This Court, following *Swift v. Tyson,* in ruling out this defense and holding the drawer, held that the question was one of general commercial law, which the Mississippi statute and the construction given to it by the Mississippi courts could not control in the Federal courts. As a prelude to its approval of the rule of *Swift v. Tyson,* this Court stated, at page 520:

> "Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation."

2. GOODMAN v. SIMONDS, 61 U. S. 343, 15 L. Ed. 934 (1858).

In sustaining one's position as a holder in due course, where the holder took the instrument as collateral security for a pre-existing debt, this Court affirmed Swift *v.* Tyson, as an exposition of general commercial law on the question there under consideration, saying, at p. 364:

"Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in *Swift* v. *Tyson*, 16 Pet. p. 1, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion; as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect."

3. OATES V. FIRST NATIONAL BANK OF MONTGOMERY, 100 U. S. 239; 25 L. Ed. 580 (1879).

In an action on a negotiable instrument, it was contended that under Alabama Law one who received a promissory note as collateral security for a pre-existing debt did not become a purchaser for value. In holding that the one taking the instrument became a purchaser for value, the court brushed aside the argument as to the applicability of the Alabama law with the following statement (p. 246):

"While the Federal Court must regard the laws of the several States, and their construction by the state courts

(except when the Constitution, treaties or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. Swift *v.* Tyson, 16 Pet., 1; Carpenter *v.* Ins. Co., 16 Pet., 495; Watson *v.* Tarpley, 18 How., 517, 15 L. ed., 509. We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal Courts to determine upon their own judgment as to what these rules and doctrines are.

"Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a bona fide holder for value of the note in suit."

4. BROOKLYN CITY & NEWTOWN R. R. CO. v. NATIONAL BANK OF REPUBLIC OF NEW YORK, 102 U. S. 14; 26 L. Ed. 61 (1880).

In this case, a question involving the rights of a holder of a negotiable instrument was again considered by this court as one of general commercial law to be decided by general principles of commercial law rather than the law of a particular state. As to the nature of this commercial law, the following Statement of the Court, at page 55, is interesting:

"Commerial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicil, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations.

"Codes, laws and ordinances of other States, says a learned writer, whether ancient or modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where the law is decided to be the other way. Levi, 2d ed., 2.

"Authoritative support to the proposition, that the decisions of the State Courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. Carpenter v. Ins. Co., 16 Pet., 495, 511."

5. NEW YORK CENT. R. R. CO. v. LOCKWOOD, 17 Wall. 357; 21 L. Ed. 627 (1873).

Here, this Court refused to be bound by the law of the State of New York permitting a common carrier to exempt itself from responsibility for its negligence by a provision in the contract of carriage. It held, rather, that, although the case arose in New York, the Federal Courts would apply general principles of commercial law and, in so doing, it was compelled to declare the exemption provision invalid.

4. THE DECISION OF THE CIRCUIT COURT IS NOT UNIQUE BUT IN ACCORD WITH MANY DECISIONS IN THE VARIOUS CIRCUIT COURTS.

The principles enunciated in Swift v. Tyson and developed in the numerous decisions since that time have been followed, as indeed they should be, in the various Circuit Courts.

In *Cudahy Packing Co.* v. *State National Bank of St. Louis*, 134 Fed. 538 (1904), the Circuit Court of Appeals for the Eighth Circuit declared an instrument negotiable, despite the fact that the statutes and decisions of Missouri, in which state the instrument originated, would declare the same non-negotiable. The Circuit Court, relying on Swift v. Tyson, found no difficulty in declaring a question involving negotiable

instruments one of general commercial law, which should be determined by broad commercial principles rather than local interpretation. The same Circuit Court has repeatedly reasserted this position. *Guernsey* v. *Imperial Bank of Canada*, 188 Fed. 300 (1911); *Smith* v. *Nelson Land & Cattle Co.*, 212 Fed. 56 (1914).

In *Peterson* v. *Metropolitan Life Ins. Co.*, 19 F. (2d) 74, affirmed 19 F. (2d) 88 (1927), the Federal Court had occasion to pass upon the applicability of a provision of Iowa's Negotiable Instruments Law and decided that inasmuch as it was merely a reenactment of well-settled principles of commercial law, the Federal Court would be bound only by decisions of a superior federal court construing said provision. *Swift* v. *Tyson*, *Watson* v. *Tarpley*, *Railroad Co.* v. *National Bank*, all *supra*, were quoted with approval.

And, in *Town of Newbern*, et al., v. *National Bank of Barnesville, Ohio*, 234 Fed. 209 (C. C. A., 6th Circuit) (1916), where the construction of a Tennessee statute dealing with municipal elections was invoked to defeat the rights of bona fide holders of the bonds issued by a municipality, the court disregarded the state decisions interpreting the state statute and decided the question on broad commercial principles, which insisted upon the protection of the bona fide holders.

The decisions of this Court and of the various Circuit Courts indicate clearly that the doctrine of Swift *v.* Tyson is to be followed, where the question involved is the construction of a negotiable instrument. In this connection, it is respectfully submitted that if the Supreme Court is to apply Swift *v.* Tyson at all, it should certainly do so in construing the provisions of the Uniform Negotiable Instruments Law. If it does not, the salutary purpose of the act is defeated. According to Petitioner's contention, the interpretation of the state where the note is given should control everywhere, regardless of how illogical, ill-reasoned or far removed from the general commercial law it might be. To adhere to such a rule would mean that an erroneous Florida decision would automatically control every court in the country in the interpretation of an instrument similar to those under consideration in the instant case, and every court would be compelled to acquiesce in the erroneous position and blindly trail along in the wake of the state court

giving its peculiar interpretation of the statute. Respondent submits that this is the very condition sought to be avoided by the rule of Swift v. Tyson, as will be seen from the following excerpt from the Court's opinion in *United States* v. *Muscatine*, 75 U. S. 575, 582; 19 L. Ed. 490, 493 (1869), when, in answering the argument that the State law should control, it stated:

> "There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. *This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part, by blindly following the footsteps of others and substituting their judgment for our own.*
>
> *"Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence."* (Italics ours.)

The Uniform Negotiable Instruments Law was conceived and urged upon each state with a dual object in mind, to do away with distinctions drawn by particular states and to codify the general commercial principles developed by the law merchant, so that persons engaged in commercial enterprises throughout the nation would have confidence in, and deal with, negotiable paper secure in their knowledge that this paper, known to them and to their predecessors for years, would continue to have the same meaning, regardless of local or sectional interpretations. Petitioner's contention is dangerous in the extreme, as it attributes to an individual state sovereignty in a field in which it never has been, and in which it is not entitled to be, supreme.

5. THE CIRCUIT COURT, IN REFUSING TO BE BOUND BY THE FLORIDA STATUTE AND ITS INTERPRETATION, DID NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

The Circuit Court, in deciding as it did, in no way violated Article IV, Section 1, of the Constitution by refusing to give full faith and credit to the Florida statute and decisions interpreting that statute. The full faith and credit clause is not applicable to the situation before this Honorable Court, inasmuch as there is no question raised as to the validity of the Florida statute. It is admitted that the Act was properly adopted and that, as to all situations to which it applies under the constitution and laws of the United States and the several states, it is effective. Assuming however, that the notes considered in *Taylor* v. *American Bank*, 63 Fla. 631, 57 So. 678 (1912), were identical with the notes now under consideration (which is not the case), the Circuit Court, by its decision, disagrees with the interpretation placed upon the Florida statute by the Florida Court, in effect, it says that proper principles of commercial law would dictate an exactly opposite ruling and, inasmuch as the Circuit Court is bound, under *Swift* v. *Tyson* and kindred cases, to apply principles of general commercial law, it must rule the instrument under consideration non-negotiable regardless of what the Florida Supreme Court would do if passing upon a similar instrument.

The construction most favorable to Petitioner that can be placed upon the action of the Circuit Court is that it has interpreted the Florida statute differently from the Florida Court. It is, however, well settled that where the validity of a state statute is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the "full faith and credit" clause of the Federal Constitution. *Western L. Ind. Co.* v. *Rupp*, 235 U. S. 261; 59 L. Ed. 220 (1914).

It is respectfully submitted that Petitioner loses sight of the nature of the full faith and credit clause. That clause, and the acts of Congress under it, establish a rule of evidence rather than one of jurisdiction. As stated by Mr. Justice Story in his Commentary on the Conflict of Laws, Sec. 609:

> "The Constitution did not mean to confer any new power upon the states, but simply to regulate the effect of the

> acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

See also Vol. 1, Willoughby, *The Constitution of the United States*, Sec. 148; *Thompson* v. *Whitman*, 18 Wall. 457; 21 L. Ed. 897 (1874).

The full faith and credit clause must be read in the light of the other provisions of the Constitution and laws thereunder, particularly Article III dealing with the Judicial Power, Section 34 of the Judiciary Act (R. S. 721) and the numerous cases construing said Act, noticeably *Swift* v. *Tyson*, *supra*.

6. UNDER GENERAL COMMERCIAL LAW, THE NOTES IN QUESTION ARE RENDERED NON-NEGOTIABLE BECAUSE OF UNCERTAINTY AS TO THE AMOUNT DUE THEREON.

According to the law merchant and the modern general commercial law founded upon the principles established by the law merchant, an instrument to be negotiable had to conform to certain requirements, one of which was that it must contain an unconditional promise or order to pay a sum certain in money. The various states, in adopting the Uniform Negotiable Instruments Act, containing this requirement, were establishing no peculiar local policy, but were merely reasserting a familiar principle of commercial law. In some portions of the Act, the various Legislatures may have sought to engraft new provisions considered by them as improvements upon the old principles, but not so with the requirement of certainty, for in that element lay the instrument's real value. Notes such as those involved in the present action were to be used in commercial dealings and were to pass freely about as representing a certain amount of value, in other words, were to take the place of money in commercial transactions. To accomplish these objects, it is absolutely essential that the instrument reveal, from the instrument itself, without resort to outside sources, that at any given date, a sum certain was due or would be due. The Circuit Court,

in the instant case (R. pp. 37, 38) ponted out that if the maker of an instrument is to be held liable in a suit by a holder for whatever sum appears to be payable from the face of the instrument, and barred from defenses available against the original payee, the extent of his liability must appear upon the face of the note; otherwise there is no certainty as to the sum due. The notes in question clearly lack that certainty.

In *First National Bank of Miami* v. *Bosler*, 297 Pa. 353 (1929), the Supreme Court of Pennsylvania, an important commercial state, ruled that the commercial law requirement of certainty embodied in the Negotiable Instruments Law of Florida (Fla. Laws 1897 C4524; Comp. Gen. L. 1927 Sec. 6760-6929) and Pennsylvania (Act of May 16, 1901, P. L. 194) meant that, if the note contained a provision for interest "it must clearly appear, from the note itself, that at any given date the two (*i. e.*, principal and interest) will always aggregate 'a sum certain.'" It accordingly declared the notes there under consideration non-negotiable as the "sum certain" was not apparent from the face of the instrument. And in another important commercial jurisdiction, New Jersey, in *New Miami Shores Corporation* v. *Duggan*, 155 Atl. 262, affirmed 160 Atl. 619, the Pennsylvania decision in *First National Bank* v. *Bosler*, *supra*, was approved and followed. The Circuit Court of Appeals approved the reasoning and conclusions reached in these cases (R. p. 38).

The notes in the instant case are even more uncertain than those involved in the Bosler case. It will be recalled that each note contains the following provision:

> "with interest thereon (the principal sum) at the rate of 7 per cent. per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent. per annum, payable semi-annually."

It will also be recalled that the notes are all dated August 28, 1925, and are payable February 28, 1926; August 28, 1926, February 28, 1927; August 28, 1927, February 28, 1928, and August 28, 1928, respectively. Taking for purposes of illustration, the note payable August 28, 1928, that instrument, if tendered to a person in payment of a bill of goods; or in

some other transaction between merchants prior to August 28, 1928, would not indicate, with any semblance of accuracy, the "sum certain" it is supposed to represent. It calls for a principal sum of $1000, with interest at 7 per cent. from August 28, 1925, "until fully paid." It also calls for "interest payable semi-annually." The logical inquiry then follows—has this interest been paid? The instrument itself reveals no notation of interest payments. It contains no interest coupons which, if still attached, would indicate that interest had not been paid and would enable a prospective purchaser to calculate quickly what the note called for. But the difficulties of one taking the instrument do not stop there. Assuming that someone furnishes information to the effect that some, or all, of the five interest payments have been paid, a person anxious to acquire the instrument still cannot tell what sum is to be paid at maturity of the instrument. He must inquire as to the exact date on which each interest payment was paid. For, if any payments of interest were "deferred," those deferred payments bear interest at ten per cent. From what date? Here again a serious ambiguity exists, as each note contains the provision "Deferred interest payments to bear interest from maturity at 10% per annum, payable semi-annually."

"Maturity" when applied to commercial paper means the time when the principal sum of a bill or note becomes due and demandable.

> *Ardmore State Bank* v. *Lee*, 61 Okla. 169, 159; Pac. 903 (1916);
>
> *Seabury* v. *Sibley*, 183 Mass. 105, 66 N. E. 603 (1903);
>
> *2 Bouvier's Law Dictionary* (3rd Edition), p. 2122.

In *First National Bank of Miami* v. *Bosler*, *supra*, in which the provision under consideration was "Deferred payments are to bear interest from maturity at ten per cent. per annum semi-annually," it is evident that the Court considered the term "maturity" as meaning the time when the principal was due. But the Petitioner contends that this ordinary, accepted meaning of the term "maturity" is not to prevail in the instant case. In the case under consideration, it is urged that "maturity" refers not to the principal debt, but to the due date of the interest payments themselves. Clearly,

a real ambiguity exists here. Exactly what was meant by the use of the term "maturity" and what was contemplated by the provision? Petitioner contends it was surely the intent of the parties that, as each interest payment was not made, interest at the increased rate was to run on the small amount of unpaid interest and continue to run until paid. Is it not equally as reasonable to suppose that the maker intended to allow all unpaid interest to accrue without penalty until maturity of principal, at which time unpaid interest would be lumped together and bear interest at the increased rate from the date of the maturity of principal.

Obviously, there are two possible constructions, each logical and warranted by the language of the instrument. The note does not definitely indicate which is the true construction, and, being capable of both, cannot be said to be certain.

The Pennsylvania court, in the Bosler case, *supra*, and the New Jersey court in *New Miami Shores Corporation* v. *Duggan*, *supra*, in ruling as they did, were merely reasserting a settled principle of construction that the negotiability of a written instrument is to be determined by what appears upon the face of the paper, unaided by outside proof. *Gazlay* v. *Riegel*, 16 Super. (Pa.) 501 (1901); *Overton* v. *Tyler*, 3 Pa. 347 (1846); *Davis* v. *Brady*, 17 S. D. 511 (1903); *Story* v. *Lamb*, 52 Mich. 525 (1884). As stated in Williston, Negotiable Instruments (1931), p. 37:

> "It is a cardinal principle that the negotiability of an instrument must be capable of determination from its face and not be dependent on extrinsic circumstances."

Under the principles established by the law merchant, negotiable instruments were to be for a sum certain, in order that they fulfill their proper functions as media of exchange and pass freely and unrestrictedly among business men and commercial houses. The classic simile used by Gibson, J., in Overton *v.* Taylor, 3 Pa. 347 (1846), when he declared that the negotiable instrument was a "courier without luggage," accurately describes the original idea of such instruments. Courts with a view towards preserving this original idea have repeatedly frowned on the addition of clauses and provisions which would

impede the passage of this "courier," recognizing that if the instrument contains novel or ambiguous provisions, persons to whom it is tendered in commercial transactions will be inclined to be wary and refuse to accept it. Inasmuch as the provisions under consideration have such effect, it is respectfully submitted that it is not the sort of negotiable instrument contemplated by the law merchant and should not be sustained as such.

The decision in the instant case, in line with that of Pennsylvania in *First National Bank of Miami* v. *Bosler*, *supra*, and *New Miami Shores* v. *Duggan*, *supra*, indicates a refreshing adherence to sound principles of commercial law, and it is therefore submitted, should not be disturbed.

CONCLUSION.

In view of the fact that this Court has so recently had the precise question presented to it and at that time declined to review the decision of the Circuit Court in a case of startling similarity, it is the contention of Respondent that Petitioner's request for a Writ of Certiorari should be denied in the instant case, particularly since Petitioner has failed to show the special and important reasons for the Writ required by this Honorable Court.

It has been shown that the Circuit Court, in its decision, merely followed well-recognized principles, and acted in accord with the decisions of this Honorable Court and the decisions of other Circuit Courts of Appeals in applying the general commercial law to the question under consideration.

It has been further shown that the Circuit Court correctly applied these general principles of commercial law in ruling the notes in question non-negotiable because of uncertainty.

It has also been shown that, by so acting, this Court violated no provisions of the Federal Constitution and that, in fact, its action was required by the Federal Constitution, the Acts of Congress and the decisions of the Federal Courts interpreting said Constitution and laws thereunder.

For the foregoing reasons, it is the contention of Respondent that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927. No. 788.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

v.

ERWIN M. FRIED,
Respondent.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 786.

Burns Mortgage Company, Inc.,
Petitioner,

v.

Erwin M. Fried,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

Two opinions were delivered by the United States District Court for the Eastern District of Pennsylvania, per District Judge Oliver B. Dickinson. An opinion Sur Statutory Demurrer was filed May 16, 1932 (R. 10-13) and an opinion Sur Motion for Reargument was filed October 10, 1932 (R. 13-15).

The Circuit Court of Appeals for the Third Circuit delivered an opinion written by Circuit Judge

J. Whitaker Thompson, filed on September 19, 1933 (R. 21-25). No opinion was delivered in the denial of a rehearing on November 15, 1933 (R. 26). The decision of the Circuit Court of Appeals is reported in 67 F (2d) 352.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938), as stated in the Petitioner's Brief.

QUESTION PRESENTED.

The question presented is whether the notes (R. 4-7) on which suit was instituted are negotiable instruments so as to entitle Petitioner to sue thereon in its own name and recover thereon free and clear of all defenses existing in favor of Respondent, the maker, against the original payee.

STATUTES INVOLVED.

A. The 34th section of the Judiciary Act (Act of September 24th, 1879 C. 20 sec. 34, 1 Stat. 92; Revised Statutes sec. 721), which provides:

> "* * * the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at

common law in the courts of the United States, in cases where they apply."

B. The Conformity Act (U. S. C. Title 28, Sec. 724):

> "'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.'"

C. The 1st and 2nd sections of the Uniform Negotiable Instruments Act (adopted in every state jurisdiction and more particularly in Florida by Laws 1897 C. 4524; Comp. Gen. L. 1927, secs. 6760-6929), which provides:

> "Sec. 1. Form of Negotiable Instrument. An instrument to be negotiable must conform to the following requirements:
>
> * * * * * * *
>
> "(2) Must contain an unconditional promise or order to pay a sum certain in money; * * *.
>
> "Sec. 2. Certainty as to Sum; What Constitutes. The sum payable is a sum certain within the meaning of this Act, although it is to be paid:
>
> "(1) With interest; or
>
> "(2) By stated installments; or
>
> "(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; * * *."

RESPONDENT'S STATEMENT OF CASE.

Petitioner brought suit in the United States District Court on six promissory notes given by Respondent in 1925 to Golden Isles Corporation for a consideration to be furnished by said Golden Isles Corporation. The consideration was never furnished. Petitioner, claiming to be the transferee, after maturity, of a holder in due course, sued on said notes in Petitioner's own name.

Each of the notes contains the following provision:

> "* * * with interest thereon (the principal sum) at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

The Respondent interposed an Affidavit of Defense raising questions of law in which he averred that the suit was improperly brought in the name of the Petitioner for the reasons, among others: (1) that the Petitioner could not sue in its own name since the notes were transferred to it after maturity; and (2) that the notes were non-negotiable, that the Petitioner who claimed title through the endorsement by the payee, was merely an assignee, and that, therefore, under Pennsylvania procedure the Petitioner could not sue in its own name, but only in the name of the assignor to its use.

The District Court, Dickinson, *J.*, reached the conclusion that under the procedural law of Pennsyl-

vania there was in the Petitioner no right of action and accordingly ruled that:

(1) The obligations sued upon were not negotiable instruments under Pennsylvania law.

(2) The Statement of Claim disclosed no legal right of action in the Petitioner.

The Petitioner moved for a re-argument, which, after rehearing, was denied, and the District Court entered a judgment of *non pros* in favor of the Respondent, the Petitioner having declined to avail itself of the opportunity given it to amend by suing in the name of the payee to its use.

In an opinion by Thompson, *C. J.*, the Circuit Court of Appeals affirmed the judgment of the District Court, following the rule established in Swift *v.* Tyson, 16 Pet. 1, and applying general principles and doctrines of commercial jurisprudence (R. 23). In applying said principles and doctrines, the Circuit Court held the notes in question non-negotiable because of the uncertainty as to the amount due thereon (R. 24).

A petition for rehearing was denied by the Circuit Court of Appeals (R. 26).

SUMMARY OF ARGUMENT.

The Circuit Court was correct in holding the notes in suit non-negotiable because of the uncertainty as to the amount due thereon.

Under the rule enunciated in Swift *v.* Tyson, 16 Pet. 1, the Circuit Court of Appeals was compelled to determine the question of negotiability according to the general commercial law and, under that general commercial law, the notes are non-negotiable.

If the law of any particular state was conclusive upon the Court, it was the law of Pennsylvania, inasmuch as a procedural point was involved and, on questions of procedure, the law of the forum, *i. e.* Pennsylvania, governs. The notes in question are non-negotiable under Pennsylvania law, consequently the Court would be compelled to reach the same result had Pennsylvania law been applied.

Even under Florida law, assuming that the law of that state should control, there has been no adjudication that notes with provisions identical to those here involved are negotiable instruments under the Uniform Negotiable Instrument Law.

In refusing to consider itself limited to the Florida law governing the construction of negotiable instruments, the Circuit Court did not refuse to give "full faith and credit" to the public acts and judicial proceedings of that state so as to violate Article IV of the Constitution.

The Circuit Court correctly applied the general commercial law in deciding that the notes were non-negotiable because the particular interest provision of said notes made the amount due thereon uncertain.

The decision of the Circuit Court of Appeals should, therefore, be affirmed.

ARGUMENT.

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS A LOGICAL APPLICATION OF THE RULE OF SWIFT v. TYSON, AND IS IN ACCORD WITH MANY APPLICATIONS OF THAT RULE BY THIS COURT.

In the celebrated case of *Swift* v. *Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865 (1842), the Supreme Court was called upon to decide whether, in determining the status of a holder of negotiable paper, it was bound to follow the law of the state of New York to the effect that a pre-existing debt was not sufficient consideration to make the one taking such an instrument a bona fide holder. This Court, per Story, *J.*, held that it was not bound to apply the law of the state of New York, where the bill of exchange was accepted, but was obliged to determine whether sufficient consideration existed according to the general principles of commercial law. In so deciding, this Court, in discussing Section 34 of the Judiciary Act of 1879, ch. 20, stated at page 18:

> "It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon *local* statutes or *local* usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to

perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is *strictly limited to local statutes and local usages of the character before stated,* and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. *The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke* v. *Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world."* (Italics ours.)

The doctrine of Swift *v.* Tyson has been recognized and applied by the Supreme Court for almost one hundred years and in a wide variety of situations. In *Carpenter* v. *Providence Washington Insurance Company,* 16 Pet. 495, 10 L. Ed. 1044 (1842), it held

that the construction of an insurance policy involved a question of general commercial law, and in *Lane* v. *Vick*, 3 How. 464, 11 L. Ed. 681 (1845), held likewise in regard to the construction of a will. In each case, the Supreme Court disregarded state decisions to make its own interpretation of the proper principles of common law applicable to the situation presented.

In *City of Chicago* v. *Robbins*, 2 Black 418, 17 L. Ed. 298 (1863), the Court refused to follow the determination of the state court as to what constituted negligence, and in *Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. Ed. 984 (1871), the Court held the determination of what constituted a dedication of land to public use to be a question of general law. In *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 21 L. Ed. 382 (1873), it was held that the determination of what is a public purpose to warrant municipal taxation involved a question of general law, in regard to which the state decisions need not be followed.

In *Liverpool and G. W. Steamboat Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 32 L. Ed. 788 (1889), a question concerning the validity of a contract for carriage of goods was held one of general law, and in *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368, 37 L. Ed. 772 (1893), the responsibility of a railroad company to its employees for personal injuries was likewise held a question of general law.

In *Salem Trust Co.* v. *Manufacturers Finance Co.*, 264 U. S. 182, 68 L. Ed. 628 (1923), there was involved a question of priority between two assignees of a debt where the latter assignee had given a prior notice to the debtor. It was declared that the question was one of general law and, therefore, that the decisions of the courts of the state where the transaction arose were not binding on the Federal Courts. An independent judgment was accordingly exercised in line with the rule of Swift *v.* Tyson.

In a comparatively recent decision, *Black & White Taxicab and Transfer Co.* v. *Brown & Yellow Taxicab and Transfer Co.*, 276 U. S. 518, 72 L. Ed. 681 (1928) the doctrine of Swift *v.* Tyson was again reaffirmed and it was held that the question whether or not the granting by a railroad company of exclusive privileges at its station to one transfer company is invalid as against public policy, is one of general law upon which the Federal Courts are not bound by state decisions.

In view of the foregoing array of decisions, it cannot be doubted that the rule of Swift *v.* Tyson is still a live doctrine to be applied by the Federal Courts.

The construction of negotiable instruments has always been considered by the Federal Courts as a question of general commercial law on which they are not bound by state decisions. The very case in which the rule was enunciated, Swift *v.* Tyson, *supra,* involved the decision by the Court as to whether the

holder of negotiable paper was a bona fide holder in view of the circumstances under which the holder acquired the instrument. The Court, as indicated above, refused to apply the law of the State of New York, saying that it would decide the question according to its construction of the general principles of commercial law and, applying these principles, the Court decided that the plaintiff was a bona fide holder and permitted recovery. In numerous cases since the pronouncement in Swift *v.* Tyson, *supra,* this Court has had occasion to apply general principles of commerical law to negotiable instrument questions in disregard of the law of particular states, as will be seen from the following cases:

1. WATSON v. TARPLEY, 18 How. 517, 15 L. Ed. 509 (1856).

In an action by an indorsee against the drawer of a bill of exchange, it appeared that the drawee had not accepted the bill, whereupon the bill was protested and notice of such fact given to the drawer. One defense suggested was that a *statute* of the state of Mississippi forbade action unless notice of non-presentment and non-payment at maturity were given. This Court, following Swift *v.* Tyson, in ruling out this defense, held that the question was one of general commercial law, which the Mississippi statute and the construction given to it by the Mississippi courts could not control in the Federal Courts. As a preface to its approval of the rule of Swift *v.* Tyson, this Court stated, at page 520:

> "Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation."

2. GOODMAN v. SIMONDS, 61 U. S. 343, 15 L. Ed. 934 (1858).

In sustaining a litigant's position as a holder in due course, where one contention was that the holder took the instrument as collateral security for a pre-existing debt, this Court affirmed Swift *v.* Tyson, as an exposition of general commercial law on the question there under consideration, saying, at p. 364:

> "Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift *v.* Tyson, 16 Pet. p. 1, as long ago as 1842; and we adopt that exposition

relative to the point under consideration on the present occasion; as one accurately defining the nature and character of the title to those instruments which such holder acquired when they are transferred to him for a valuable consideration."

3. BOYCE v. TABB, 18 Wall 546, 21 L. Ed. 757 (1873).

Shortly after the Thirteenth Amendment to the Constitution had been adopted, the Louisiana courts held, on the ground of public policy, that they would not enforce contracts for the purchase and sale of slaves, even though the contracts sued on were valid when made, *i. e.*, when entered into prior to the adoption of the Thirteenth Amendment. In an action on a promissory note given in Louisiana in connection with the purchase of slaves prior to the adoption of the Amendment the defense was raised that the Federal courts were bound under Section 34 of the Judiciary Act to follow the Louisiana decisions. The Court, however, allowed recovery on the note, saying that the question was one of general commercial law, upon which it, as a Federal court, could exercise an independent judgment, saying that Section 34 of the Judiciary Act was not intended to apply to "questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor on any principle which had become a settled rule of property."

4. OATES v. FIRST NATIONAL BANK OF MONTGOMERY, 100 U. S. 239; 25 L. Ed. 580 (1879).

In an action on a negotiable instrument, it was contended that under Alabama Law one who received a promissory note as collateral security for a pre-existing debt did not become a purchaser for value in the course of business. In holding that the one taking the instrument under such circumstances became a purchaser for value, the court brushed aside the argument as to the applicability of the Alabama law with the following statement (p. 246):

> "While the Federal Court must regard the laws of the several States, and their construction by the state courts (except when the Constitution, treaties or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. Swift *v.* Tyson, 16 Pet., 1; Carpenter *v.* Ins. Co., 16 Pet., 495; Watson *v.* Tarpley, 18 How. 517, 15 L. Ed., 509. We have already seen that the *statutes of Alabama placed under the protection of the commercial law promissory notes*, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal Courts to determine upon their own judgment as to what these rules and doctrines are.

"Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a bona fide holder for value of the note in suit." (Italics ours.)

5. BROOKLYN CITY & NEWTOWN R. R. CO. v. NATIONAL BANK OF REPUBLIC OF NEW YORK, 102 U. S. 14; 26 L. Ed. 61 (1880).

In this case, a question involving the rights of a holder of a negotiable instrument was again considered by this court as one of general commercial law to be decided by general principles of commercial law rather than the law of a particular state. As to the nature of this commercial law, the following statement of Clifford, *J.*, at page 55, is interesting:

"Commercial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicil, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations.

"Codes, laws and ordinances of other States, says a learned writer, whether ancient or modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where

the law is decided to be the other way. Levi, 2d. ed., 2.

"Authoritative support to the proposition, that the decisions of the State Courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. Carpenter *v.* Ins. Co., 16 Pet., 495, 511."

A review of the above cases indicates clearly that questions involving negotiable instruments are within the special purview of Swift *v.* Tyson, *supra.* The law of negotiable instruments, developed to meet the needs of those engaged in commercial transactions throughout the world, is the very sort of situation the Court, in Swift *v.* Tyson, must have had in mind. In no other field is it as desirable to have real uniformity and that real uniformity, it is submitted, can only be accomplished by applying the ruling of Swift *v.* Tyson to questions involving the construction of negotiable instruments.

The Petitioner contends that the fact that Florida has passed a statute on the subject deprives Swift *v.* Tyson of its applicability to the instant case. But, it should be noted, Story, *J.*, at p. 19, in his opinion in that famous case, indicates the contrary, when he states:

"And we have not now the slightest difficulty in holding, that this section, (Section 34 of the Judiciary Act) upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, *and*

does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." (Italics ours.)

Can the Uniform Negotiable Instrument Law passed by Florida be considered a local statute within the meaning of the above decision to warrant a disregard of the rule of Swift *v.* Tyson? It is respectfully submitted that it cannot be so considered.

In numerous cases heretofore, even though State statutes were involved, this Court has declined to consider itself bound by the interpretation of these statutes where they have had to do with mercantile or general commercial law, this Court reasserting the doctrine of Swift *v.* Tyson that it must decide those questions after an independent investigation and an application of what it conceives to be sound principles of commercial law. The following cases seem to be especially in point:

1. BOARD OF SUPERVISORS OF MARSHALL COUNTY v. SCHENCK, 72 U. S. 772, 18 L. Ed. 556 (1867).

In this case bonds were issued by a county in Illinois and appeared on their face to be duly issued. As a matter of fact, an Illinois statute required that the order for the election to secure the voters' consent to the bond issue be issued by supervisors of the county rather than by the county court. This provision of the statute was not observed in the issuance

of the bonds. The Illinois Supreme Court had held that such bonds were void, even in the hands of an innocent holder. This Court, however, held that this was a question of commercial law on which the Federal court would not be bound by the State decisions and, therefore, held that the bonds were good in the hands of a bona fide holder.

2. TOWN OF PAÑA v. BOWLER, 107 U. S. 529, 27 L. Ed. 424 (1883).

In this case bonds were issued by a town in Illinois to raise funds for donation to a railroad company. An Illinois statute prescribed certain formalities for the election to determine whether the bonds should be issued. The formalities were not complied with. The Illinois Supreme Court held that a bona fide holder of the bonds could not recover from the town in view of the irregular circumstances attending their issuance. In the Federal courts, however, the bona fide holders were permitted to recover, this Court indicating that the Federal courts were not bound by the State decision inasmuch as the matter was one of general commercial law.

3. BURGESS v. SELIGMAN, 107 U. S. 20, 27 L. Ed. 359 (1883).

A Missouri statute made stockholders of a corporation liable for unpaid debts at the time of dissolution. Seligman & Co. held stock of the corporation as collateral security and, under the terms of the Missouri statute, claimed an exemption as such pledgee from

personal liability. The Missouri Supreme Court, however, had held that the exemption privilege did not extend to Seligman & Co. as the exemption provision of the statute did not extend to persons receiving such stock as collateral security from the corporation itself. When the same question was presented to this court, it was held that the State decisions were inapplicable and that Seligman & Co. were entitled to be released from liability. The State decisions were thus disregarded.

4. TOWN OF ENFIELD v. JORDAN, 119 U. S. 680, 30 L. Ed. 523, (1887).

In another case involving the issuance of bonds by a town, the State Supreme Court had held that a municipal corporation could not make its bonds payable elsewhere than at the office of the town treasurer. The Federal Court, however, refused to consider itself bound by the State decision, indicating that it was a question of general commercial law on which an independent judgment would be exercised.

5. PRESIDIO COUNTY v. NOEL-YOUNG BOND AND STOCK Co., 212 U. S. 58, 53 L. Ed. 402 (1909).

In this case, county bonds were illegally issued by county commissioners, although there was nothing on the face of the bond which indicated that the statutes governing the issuance of bonds had not been complied with. The Supreme Court of Texas had held that persons purchasing these bonds were put upon inquiry as to the circumstances under which they

were issued and could therefore not recover in view of the original failure to comply with the law. In the Federal court it was held that a person taking such bonds without knowledge of the circumstances of issuance was a bona fide owner. This Court held that the Federal courts were not bound by the Texas decisions.

In each of the foregoing cases, the particular state had legislated concerning the subject matter under consideration. The fact, however, that a statute had been passed did not, of itself, remove the subject matter from the field of the mercantile or commercial law concerning which the Federal Courts, since Swift *v.* Tyson, *supra,* have been obliged to exercise their independent judgment and apply their own construction of the general commercial law.

The lower Federal Courts have frequently taken the position that they are not bound by state decisions construing statutes which are merely declaratory of the common law.

In *Cudahy Packing Co.* v. *State National Bank of St. Louis,* 134 Fed. 538 (1904), the Circuit Court of Appeals for the Eighth Circuit declared an instrument negotiable, despite the fact that under the statutes and decisions of Missouri, in which state the instrument originated, it would have been held non-negotiable. The Circuit Court, relying on Swift *v.* Tyson, found no difficulty in declaring a question involving negotiable instruments one of general commercial law, which should be determined by broad

commercial principles rather than local interpretation. The same Circuit Court has re-asserted this position in *Guernsey* v. *Imperial Bank of Canada,* 188 Fed. 300 (1911), and *Smith* v. *Nelson Land & Cattle Co.,* 212 Fed. 56 (1914).

In *Peterson* v. *Metropolitan Life Ins. Co.,* 19 F. (2d) 74 (1926), affirmed in 19 F. (2d) 88 (1927), the Federal Court had occasion to pass upon the applicability of a provision of Iowa's Negotiable Instruments Law and decided that, inasmuch as it was merely a re-enactment of well-settled principles of commercial law, the Federal Court would be bound only by decisions of a superior federal court construing said provision. Swift *v.* Tyson, Watson *v.* Tarpley, Brooklyn City and Newtown Railroad Co. *v.* National Bank of the Republic of New York, all *supra,* were quoted with approval.

In *Mutual Life Ins. Co.* v. *Lane,* 151 Fed. 276 (1907), affirmed in 157 Fed. 1002, certiorari denied 208 U. S. 617, the Federal Circuit Court, for the Eastern District of Georgia, ruled that it was not bound by the decision of the highest appellate court in Georgia construing a Georgia statute dealing with contracts of insurance, on the ground that the statute was merely declaratory of a general principle of commercial law.

In *Capital City State Bank* v. *Swift,* 290 Fed. 505 (1923), a Federal Court held the same provision of the Negotiable Instruments Act now under consideration merely declaratory of the common law and, inasmuch as a question of general commercial law was involved,

refused to follow the construction of such statute by the Supreme Court of Oklahoma.

Similarly, in *Jockmus* v. *Claussen & Knight, Inc.*, 47 F. (2d) 766 (1930), a Federal Court indicated that the interpretation of the Florida Negotiable Instruments Act by the Florida Supreme Court would not be binding on the Federal Courts, the question under consideration being one of general commercial law.

It is respectfully submitted that the passage of the Uniform Negotiable Instrument Act by a state should not have the effect of abrogating the rule of Swift *v.* Tyson but, on the contrary, furnishes an additional reason for adherence to that rule.

If there is any field in which uniformity is particularly desirable it is in the construction of negotiable instruments. Having in mind the fact that such instruments passed freely in commercial transactions and were to be widely distributed, it is not surprising that this Court sought to accomplish real uniformity by considering negotiable instrument questions matters of general commercial law rather than local matters as to which state laws would control. Obviously, this Court, in deciding Swift *v.* Tyson, knew that it was establishing a precedent for Federal Courts sitting in New York different from the rule which would be applied by the state courts in New York faced with the same question. It found no difficulty in ruling that two courts sitting in the same locality should apply different principles. In seeking

to apply what it conceived to be the general commercial law, it was making a definite step towards uniformity and seeking to localize the effect of a decision which it believed to be out of harmony with the principles of general commercial law. The fact that Swift v. Tyson has been repeatedly affirmed and followed indicates that this Court has been consistent in its efforts to accomplish real uniformity so far as matters of general commercial law are concerned.

The Uniform Negotiable Instruments Law was urged upon and adopted by the states with the same idea of uniformity in mind. It was not intended to supplant or to change principles of commercial law as they were recognized throughout the commercial world, but to re-enact or codify the settled and established principles familiar to those engaged in commercial enterprises. As stated by the court in *Taylor* v. *American National Bank*, 63 Fla. 631, 649, the case urged upon this Court by Petitioner as controlling,

> "It should be borne in mind that the 'Negotiable Instrument Law,' which has been adopted by a majority of the states, including Florida, is primarily a codification of the rules of the law merchant.' It has also been termed 'in substance a codification of the principles of the common law governing negotiable instruments.' See Section 1 of Selover's Negotiable Instrument Law, 2nd ed."

Since the passage of the Uniform Negotiable Instruments Law by the various states with the definite

aim of accomplishing uniformity in regard to the form and effect of negotiable instruments, it is even more important that the doctrine of Swift *v.* Tyson be followed than it was formerly. Real uniformity can only be accomplished if the Federal courts still continue to determine questions involving the construction of negotiable instruments by an independent investigation and an application of what they conceive to be general principles of commercial law. To limit them to the decisions of one state is to lessen the possibility of the complete national uniformity sought by the Uniform Negotiable Instruments Act. It is submitted that a disregard of the rule of Swift *v.* Tyson in the instant case would be fatal to the accomplishment of such uniformity. It would make impossible the localization of an erroneous or poorly reasoned state interpretation. Instead, if all Federal courts are to be bound by the decision of the State court the injurious effect of an unsound state decision is injected into the federal system, the decision of the state court thus being given an effect far beyond its deserts and considerably beyond the intent of the framers of the Constitution as that intent was interpreted by the decision in Swift *v.* Tyson.

If the state interpretation is sound and well reasoned, it will be given consideration by the Federal courts in its determination of the general commercial law, as has always been the case, but the Federal courts must not be concluded thereby, if they are to perform the functions allocated to them by the

Constitution and the Acts of Congress passed thereunder.

An equally cogent reason for following the rule of Swift *v.* Tyson in the instant case is that a disregard of that rule would be a direct interference with the judicial system established by the Federal Constitution. Sec. 1 Art. III, vests judicial power in the Supreme Court and such inferior courts as Congress may establish, and Sec. II of Art. III provides that the judicial power shall extend to all cases in law and equity arising under the Constitution, the same section extending the judicial power to include controversies between citizens of different states, such as the controversy existing in the instant case. As interpreted in Swift *v.* Tyson, the Constitution by these provisions gave to litigants privileged to use the Federal courts the right to have questions of general commercial law determined by the Federal court after an independent investigation of the principles of commercial law applicable to the situation. To approve the position of Petitioner would be to declare that in one large field of commercial law, namely the construction of negotiable instruments, the Federal courts are prevented from exercising an independent judgment, and, provided the state courts have interpreted the general commercial law as codified in their Negotiable Instruments Act, must merely re-echo the position of the state court, however ill advised or unsound the position of the state court might be, or however far

removed from general principles of commercial law that decision might be. It is respectfully submitted that, in such event, the right of a plaintiff to sue in the Federal courts by reason of diversity of citizenship is worthless in cases involving negotiable instruments, further, that the Federal courts will have surrendered to the State Courts a portion of the jurisdiction granted to them under the Constitution, and laws enacted by Congress, a jurisdiction which has been repeatedly recognized ever since this Court's decision in Swift *v.* Tyson in 1842.

It is further submitted that one particular weakness of Petitioner's position lies in the fact that it presupposes a definite fixity of interpretation by the state courts. But state courts have been known to reverse their position in the interpretation of statutes. An examination of the situation in *Gelpcke* v. *Dubuque,* 1 Wall. 175, 17 L. Ed. 520 (1864), is helpful in this regard. There, the City of Dubuque had issued certain bonds to purchase stock in a railroad company. In an action by bona fide holders of these bonds the defense was set up that the legislature of Iowa had no authority under the Iowa constitution and statutes to authorize municipal corporations to issue bonds in payment for stock in railroad companies. It appeared that the Supreme Court of Iowa had, in several decisions, held that bonds issued for this purpose by municipalities were valid. At the time the case was presented to the Federal court, however, a recent decision

of the Supreme Court of Iowa had overruled the earlier decisions and declared that, under the constitution and statutes of Iowa, the bond issue was invalid and that even bona fide holders of the bonds could not recover. The argument was advanced that the Federal courts were bound by the later interpretation of the constitution and statutes by the highest court of the state. The United States Supreme Court, however, declared that the bona fide holders could recover, and disregarded the later pronouncement of the Iowa Supreme Court. The Court, in its opinion, indicated that it disagreed with the latest decision of the Iowa Supreme Court, pointing out that it, with a few other decisions, stood alone, and that the earlier decisions were sustained by reason and authority.

The question presented to the court in *Gelpcke* v. *Dubuque* was one of general commercial law, namely the right of a holder of a negotiable bond to recover from the obligor, despite an irregularity in its issuance not apparent from the face of the obligation. It is respectfully submitted that the interpretation by a Florida court of the Florida statute now under consideration is no more binding on the Federal courts than was the interpretation by the Iowa court of the statute under which the bonds were issued in *Gelpcke* v. *Dubuque, supra.*

The practical difficulty with Petitioner's position is apparent here. If Petitioner's contention is correct, it makes the Federal court a vacillating body, shifting and changing its position on questions of com-

mercial law as the state court changes its position. A ruling which would have this effect, it is submitted, is hardly consistent with the dignity of the Federal courts and decidedly at variance with the intent of the framers of the Constitution.

2. ASSUMING THAT THE CIRCUIT COURT ERRED IN APPLYING GENERAL COMMERCIAL LAW, SUCH ERROR WAS HARMLESS, AS IT WOULD BE COMPELLED TO APPLY PENNSYLVANIA LAW, THE LAW OF THE FORUM, TO THE PROCEDURAL QUESTION INVOLVED AND THE PENNSYLVANIA LAW ACCORDS WITH THAT FOUND BY THE COURT TO BE GENERAL COMMERCIAL LAW.

If the Circuit Court erred in applying general commercial law under the rule of Swift *v.* Tyson, the error was harmless, inasmuch as it would have been compelled to apply Pennsylvania law, the question involved being one of procedure, and the Pennsylvania law is in accord with that declared by the Circuit Court as the general commercial law.

It is settled law in the Federal Courts that the law of the forum governs as to all questions of practice and procedure. The District Court, in the first instance, had before it the question whether the holder of the instrument had a right to sue in his own name, the determination of which question necessarily involved a decision as to the negotiability of the note on which suit was brought. As stated by the Circuit Court in its opinion (R. p. 22):

> "The ultimate question for decision on appeal is a procedural one: whether the Burns Mortgage Company, Inc. was entitled to bring suit in its own name as plaintiff."

Also, in its opinion, it was stated by the Circuit Court (R. p. 24):

> "In view of our discussion concerning the negotiability of the notes in suit, we do not deem it necessary to do more than indicate that the Conformity Statute (28 U. S. C. A. 724) requires that in all procedural matters we apply the law of the state within which the District Court is held."

The Conformity Act referred to in the above quoted excerpt from the opinion of the Circuit Court provides:

> "'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.'"

Under the Conformity Act it has been definitely established that in civil actions instituted in the Federal Court, questions of practice and procedure are to be regulated by the law of the state within which the District Court is held. A question as to

the person in whose name suit should be brought in the District Court is a question of practice or procedure within the meaning of the Conformity Act. *New York Evening Post* v. *Chaloner* (C. C. A., N. Y.) 265 Fed. 204, 211 (1920); writ of certiorari dismissed, 252 U. S. 591 (1920).

There is also additional authority for the proposition that, in a situation similar to the one involved in the instant case, the law of the forum rather than the law of the place of contract governs the negotiability of a written instrument.

Roads *v.* Webb, 91 Me. 406 (1891);
Roosa *v.* Crist, 17 Ill. 450 (1855);
Hakes *v.* Terra Haute N. Bk., 164 Ill. 273 (1896);
McRae *v.* Mattoon, 10 Pick. (Mass.) 53 (1830);
First Nat'l Bank of Miami *v.* Bosler, 297 Pa. 353 (1929).

The following succinct statement by the Court in Roads *v.* Webb, *supra,* at p. 412, is illustrative of the principle followed in the cases cited above.

> "But the *lex fori* governs as to all matters pertaining to the remedy. That law governs as to the negotiability of the contract, because upon it depends the question who has a right of action."

The same proposition is again set forth as a well settled principle of law in 8 C. J. 94 in the following language:

> "In so far as the question of the negotiability of an instrument determines the right of a transferee to sue thereon, the law of the forum governs, to determine whether the transferee can sue in his own name. In other words, the law of the forum, rather than the law of the place of contract, governs the negotiability of a note so far as the question of who may sue depends on negotiability."

In view of the decision of the Pennsylvania Supreme Court in *First National Bank of Miami* v. *Bosler, supra* (referred to at length *infra*), it is submitted that an application of Pennsylvania law would necessitate a ruling in accord with that of the Circuit Court; namely, that the notes in question are non-negotiable because uncertain as to the amount due thereon.

3. THE LAW OF FLORIDA HAS NOT DEFINITELY DETERMINED THAT A NOTE CONTAINING THE IDENTICAL PROVISIONS APPEARING IN THE NOTES IN SUIT IS NEGOTIABLE UNDER THE FLORIDA NEGOTIABLE INSTRUMENTS LAW.

The Florida Supreme Court has not determined whether an instrument such as the one now under consideration is negotiable under its Negotiable Instruments Law, consequently there is no authoritative interpretation for the Federal Courts to follow, assuming that the doctrine of Swift *v.* Tyson is to be

disregarded. In *Taylor* v. *American National Bank*, 63 Fla. 631, 57 So. 678 (1912), the case urged upon the Court by Petitioner as controlling, there was no provision for interest on deferred interest payments "from maturity" such as is involved in the instant case and which, it is contended by Respondent, makes the instruments involved in the instant case non-negotiable.

4. THE CIRCUIT COURT, IN REFUSING TO BE BOUND BY THE FLORIDA STATUTE AND ITS INTERPRETATION, DID NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

The Circuit Court, in deciding as it did, in no way violated Article IV, Section 1, of the Constitution by refusing to give full faith and credit to the Florida statute and decisions interpreting that statute. The full faith and credit clause is not applicable to the situation before this Court, inasmuch as there is no question raised as to the validity of the Florida statute. It is admitted that the Act was properly adopted and that, as to all situations to which it applies under the Constitution and laws of the United States and several states, it is effective. Assuming however, that the notes considered in *Taylor* v. *American Bank*, 63 Fla. 631, 57 So. 678 (1912), were identical with the notes now under consideration (which is not the case), the Circuit Court, by its decision, disagrees with the interpretation placed upon

the Florida statute by the Florida Court; in effect, it says that proper principles of commercial law would dictate an exactly opposite ruling and, inasmuch as the Circuit Court is bound, under *Swift* v. *Tyson*, and kindred cases, to apply principles of general commercial law, it must rule the instrument under consideration non-negotiable regardless of what the Florida Supreme Court would do if passing upon a similar instrument.

The construction most favorable to Petitioner that can be placed upon the action of the Circuit Court is that it has interpreted the Florida statute, or rather, the general commercial law as expressed in the Florida statute, differently from the Florida Court. It is, however, well settled that where the validity of a state statute is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the "full faith and credit" clause of the Federal Constitution. *Western L. Ind. Co.* v. *Rupp*, 235 U. S. 261; 59 L. Ed. 220 (1914).

It is respectfully submitted that Petitioner loses sight of the nature of the full faith and credit clause. That clause, and the acts of Congress under it, establish a rule of evidence rather than one of jurisdiction. As stated by Mr. Justice Story in his Commentary on the Conflict of Laws, Sec. 609:

> "The Constitution did not mean to confer any new power upon the states, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory."

See also Vol. 1, Willoughby, *The Constitution of the United States*, Sec. 148; *Thompson* v. *Whitman*, 18 Wall. 457; 21 L. Ed. 897 (1874).

The full faith and credit clause must be read in the light of the other provisions of the Constitution and laws thereunder, particularly Article III dealing with the Judicial Power, Section 34 of the Judiciary Act (R. S. 721) and the numerous cases construing said Act, noticeably *Swift v. Tyson, supra.*

5. UNDER GENERAL COMMERCIAL LAW, THE NOTES IN QUESTION ARE RENDERED NON-NEGOTIABLE BECAUSE OF UNCERTAINTY AS TO THE AMOUNT DUE THEREON.

According to the law merchant and the modern general commercial law founded upon the principles established by the law merchant, an instrument to be negotiable was obliged to conform to certain requirements, one of which was that it must contain an unconditional promise or order to pay a sum certain in money. The various states, in adopting the Uniform Negotiable Instruments Act, containing this requirement, were establishing no peculiar local policy, but were merely reasserting a familiar principle of commercial law. In some portions of the Act, the various Legislatures may have sought to engraft new provisions considered by them as improvements upon the old principles, but not so with the requirement of certainty, for in that element lay the instrument's real value. Notes such as those involved in the

present action were to be used in commercial dealings and were to pass freely about as representing a certain amount of value, in other words, were to take the place of money in commercial transactions. To accomplish these objects, it is absolutely essential that the instrument reveal, from the instrument itself, without resort to outside sources, that at any given date, a sum certain was due or would be due. The Circuit Court, in the instant case (R. p. 24) pointed out that if the maker of an instrument is to be held liable in a suit by a holder for whatever sum appears to be payable from the face of the instrument, and barred from defenses available against the original payee, the extent of his liability must appear upon the face of the note; otherwise there is no certainty as to the sum due. The notes in question clearly lack that certainty.

In *First National Bank of Miami* v. *Bosler,* 297 Pa. 353 (1929), the Supreme Court of Pennsylvania, an important commercial jurisdiction, ruled that the commercial law requirement of certainty embodied in the Negotiable Instruments Law of Florida (Fla. Laws 1897, C. 4524; Comp. Gen. L. 1927 Sec. 6760-6929) and Pennsylvania (Act of May 16, 1901, P. L. 194) meant that, if the note contained a provision for interest "it must clearly appear, from the note itself, that at any given date the two (*i. e.,* principal and interest) will always aggregate 'a sum certain.'" It accordingly declared the notes there under consideration non-negotiable as the "sum certain" was

not apparent from the face of the instrument. And in another important commercial jurisdiction, New Jersey, in *New Miami Shores Corporation* v. *Duggan*, 9 N. J. Mis. R. 620, 155 Atl. 262 (1931), affirmed 109 N. J. L. 220, 160 Atl. 619 (1932), the Pennsylvania decision in *First National Bank* v. *Bosler, supra,* was approved and followed. The Circuit Court of Appeals approved the reasoning and conclusions reached in these cases (R. p. 24).

The notes in the instant case (R. pp. 4-7 inc.) are even more uncertain than those involved in the Bosler case. It will be recalled that each note contains the following provision:

> "with interest thereon (the principal sum) at the rate of 7 per cent. per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent. per annum, payable semi-annually."

It will also be recalled that the notes are all dated August 28, 1925, and are payable February 28, 1926, August 28, 1926, February 28, 1927, August 28, 1927, February 28, 1928, and August 28, 1928, respectively. Taking for purposes of illustration, the note payable August 28, 1928 (R. p. 7), that instrument, if tendered to a person in payment of a debt or in some other mercantile transaction prior to August 28, 1928, would not indicate, with any semblance of accuracy, the "sum certain" it is supposed to represent. It calls for a principal sum of $1000, with interest at 7 per cent. from August 28, 1925, "until fully paid." It

also calls for "interest payable semi-annually." The logical inquiry then follows—has this interest been paid? The instrument itself reveals no notation of interest payments. It contains no interest coupons which, if still attached, would indicate that interest had not been paid and would enable a prospective purchaser to calculate quickly what the note called for. But the difficulties of one taking the instrument do not stop there. Assuming that someone furnishes information to the effect that some, or all, of the five interest payments have been paid, a person about to acquire the instrument still cannot tell what sum is to be paid at maturity of the instrument. He must inquire as to the exact date on which each interest payment was paid. For, if any payments of interest were "deferred," those deferred payments bear interest at ten per cent. From what date? Here another serious ambiguity exists, as each note contains the provision "Deferred interest payments to bear interest from maturity at 10% per annum, payable semi-annually."

"Maturity" when applied to commercial paper means the time when the principal sum of a bill or note becomes due and demandable.

Ardmore State Bank v. *Lee,* 61 Okla. 169, 159; Pac. 903 (1916);

Seabury v. *Sibley,* 183 Mass. 105, 66 N. E. 603 (1903);

2 *Bouvier's Law Dictionary* (3rd Edition), p. 2122.

In *First National Bank of Miami* v. *Bosler, supra,* in which the provision under consideration was "Deferred payments are to bear interest from maturity at ten per cent. per annum semi-annually," it is evident that the Court considered the term "maturity" as meaning the time when the principal was due. But the Petitioner contends that this ordinary, accepted meaning of the term "maturity" is not to prevail in the instant case. In the case under consideration, it is urged that "maturity" refers not to the principal debt, but to the due date of the interest payments themselves. Clearly, a real ambiguity exists here. Exactly what was meant by the use of the term "maturity" and what was contemplated by the provision? Petitioner contends it was surely the intent of the parties that, as each interest payment was not made, interest at the increased rate was to run on the small amount of unpaid interest and continue to run until paid. Is it not equally as reasonable to suppose that the maker intended to allow all unpaid interest to accrue without penalty until maturity of principal, at which time unpaid interest would be lumped together and bear interest at the increased rate from the date of the maturity of principal.

Obviously, there are two possible constructions, each logical and warranted by the language of the instrument. The note does not definitely indicate which is the true construction, and, being capable of both, cannot be said to be certain.

In *Acme Coal Co.* v. *Northrup National Bank of Iola, Kan.,* 23 Wyo. 66, 146 Pac. 593 (1915), relied

upon by Petitioner, the question was not similar to the one here presented. In that case, the statute provided that where printed and written provisions of the instrument conflicted, the written provision should prevail. Accordingly, there was no ambiguity there—the written provision was the only applicable provision. If the statute had been silent as to which provision should prevail, it would hardly be contended that the instrument in *Acme Coal Co.* v. *Northrup National Bank, etc.,* containing as it did two conflicting rates of interest possessed the certainty required by general commercial law. No statutory assistance appears to indicate the true meaning of the provision as to maturity in the instant case, consequently it is the contention of Respondent that the resulting uncertainty deprives the instrument of negotiability.

The Pennsylvania court, in the Bosler case, *supra,* and the New Jersey court in *New Miami Shores Corporation* v. *Duggan, supra,* in ruling as they did, were merely reasserting a settled principle of construction that the negotiability of a written instrument is to be determined by what appears upon the face of the paper, unaided by outside proof. *Gazlay* v. *Riegel,* 16 Super. (Pa.) 501 (1901); *Overton* v. *Tyler,* 3 Pa. 347 (1846); *Davis* v. *Brady,* 17 S. D. 511 (1903); *Story* v. *Lamb,* 52 Mich. 525 (1884); *Waterhouse* v. *Chouinard,* 128 Me. 505, 149 Atl. 21 (1930). As stated in Williston, Negotiable Instruments (1931), p. 37:

> "It is a cardinal principle that the negotiability of an instrument must be capable of determination from its face and not be dependent on extrinsic circumstances."

Under the principles established by the law merchant, negotiable instruments were to be for a sum certain, in order that they fulfill their proper functions as media of exchange and pass freely and unrestrictedly among business men and commercial houses. The classic simile used by Gibson, *J.*, in Overton *v.* Taylor, 3 Pa. 347 (1846), when he declared that the negotiable instrument was a "courier without luggage," accurately describes the original idea of such instruments. Courts with a view towards preserving this original idea have repeatedly frowned on the addition of clauses and provisions which would impede the passage of this "courier," recognizing that if the instrument contains novel or ambiguous provisions, persons to whom it is tendered in commercial transactions will be inclined to be wary and refuse to accept it. Inasmuch as the provisions under consideration have such effect, it is respectfully submitted that it is not the sort of negotiable instrument contemplated by the law merchant and should not be sustained as a negotiable instrument under the general commercial law.

The decision of the Circuit Court, in line with that of Pennsylvania in *First National Bank of Miami* v. *Bosler, supra,* and *New Miami Shores* v. *Duggan, supra,* indicates an adherence to sound principles of commercial law, and, it is therefore submitted, should not be disturbed.

CONCLUSION.

It has been shown that the Circuit Court, in its decision, merely followed well recognized principles and acted in accord with the decisions and expressions of this Court and the decisions of other lower Federal Courts in applying the general commercial law in order to determine the negotiability of the notes under consideration. It has been further shown that, in deciding as it did, the Circuit Court committed no error and, even though error was committed, such error was harmless, as the law of the forum applicable to the procedural point involved is in accord with that found by the Circuit Court to be the general commercial law. Even though it be assumed that Florida law should control, no adjudication by the highest Florida Court appears to have passed upon notes with provisions identical to those involved in the instant case.

It has been further shown that the Circuit Court correctly applied general principles of commercial law in ruling the notes in question non-negotiable because of uncertainty and that, by so acting, the Circuit Court violated no provision of the Federal Constitution. On the contrary, the action of the Circuit Court was required by the Constitution, the Acts of Congress and the decisions of this Court and the lower Federal Courts interpreting the Constitution and laws thereunder.

For the foregoing reasons, it is the contention of Respondent that the decision of the Circuit Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 786.—October Term, 1933.

Burns Mortgage Company, Inc., Petitioner, *vs.* Erwin M. Fried.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 28, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

This writ brings here for review a judgment entered by the District Court for eastern Pennsylvania in an action on six instruments, each promising the payment of $1000, all of even date and like tenor. They were executed and delivered by the respondent at Miami, Florida, and were there payable to Golden Isles Corporation at intervals of six months, the first falling due six months from August 28, 1925, and the last three years from that date. Prior to maturity the payee endorsed and delivered them to one Williamson, who, after refusal of payment at maturity, transferred them by delivery to the petitioner. In response to the petitioner's statement of claim the respondent filed an affidavit of defense in the nature of a statutory demurrer, asserting that as the writings did not embody a promise to pay a sum certain they were not negotiable notes.

The District judge followed the decisions of the Pennsylvania courts to the effect that the holder of negotiable paper, whether he obtained title before or after dishonor, may sue in his own name,[1] but must sue as use-plaintiff in the name of the obligee if the instrument is not negotiable.[2] Concluding that the notes were not negotiable and consequently the petitioner could sue only in the name of Golden Isles Corporation, he sustained the affidavit of

[1] *Rankin* v. *Woodworth*, 2 Watts (Pa.) 134; *Hanratty* v. *Dougherty*, 71 Pa. Super. Ct. 248.

[2] *Fahnestock* v. *Schoyer*, 9 Watts (Pa.) 102; *Reynolds* v. *Richards*, 14 Pa. 205.

defense, and, as the petitioner refused to amend, entered judgment for the respondent. The Court of Appeals affirmed.[3]

The provisions held to create the uncertainty which deprived the notes of negotiability, were: "with interest thereon [the principal sum] at the rate of 7% per cent per annum from date until fully paid. Interest payable semi-annually . . . . Deferred interest payments to bear interest from maturity at ten per cent per annum, payable semi-annually."

The petitioner urged that as Florida had adopted the uniform Negotiable Instruments Law the federal courts were bound to decide the issue according to that statute as interpreted by the Florida court of last resort; the respondent insisted as the action was in the District Court sitting in Pennsylvania, which had also adopted the Uniform Act, the statute as interpreted by the courts of that state must be applied. The Circuit Court of Appeals held that it need not adopt the construction of the Act by the courts of either state, but should decide the case upon the general principles of the law merchant. From these it concluded the quoted provisions rendered the instruments uncertain as to the amount payable and therefore non-negotiable.

1. The conformity act[4] required the trial court to apply the local law in matters of procedure. The form of action and the right in which it must be brought were therefore governed by the Pennsylvania practice. But the procedural question turned on another of substance, namely, whether the instruments were negotiable.

2. The negotiable quality of the notes is to be ascertained by reference to the law of Florida.[5] The Uniform Negotiable Instruments Law adopted in that State provides[6] (Sec. 1) that,

"An instrument to be negotiable must conform to the following requirements:

"(2) Must contain an unconditional promise or order to pay a sum certain in money."

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[3] 67 F. (2d) 352.

[4] U. S. C. Tit. 28, § 724.

[5] Ogden, Negotiable Instruments, (3d Ed.) 374; *Tilden* v. *Blair*, 21 Wall. 241; *Kobey* v. *Hoffman*, 229 Fed. 486.

[6] Florida Compiled General Laws, §§ 6761, 6762.

And by Sec. 2 it is declared:

"The sum payable is a sum certain within the meaning of this Act, although it is to be paid: (1) With interest; or (2) By stated installments; or (3) By stated installments, with a provision that upon the default in payment of any installment or of interest, the whole shall become due; . . ."

Section 34 of the Judiciary Act of 1789 directs that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.[7] The applicable state statute furnishes the rule of decision for a federal court sitting in the state[8] or outside its borders.[9] And in that court the law must be given the meaning and effect attributed to it by the highest court of the state, as if the state court's decision were literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views.[10] The petitioner says the Supreme Court of Florida has construed the pertinent sections of the Negotiable Instrument Law as declaring writings of the tenor of those in suit to be negotiable, and the courts below were, therefore, bound so to rule. The Circuit Court of Appeals, however, held that the construction by a state court of last resort of a state statute which is merely declaratory of the common law or law merchant does not bind federal courts. It ascribed that character to the Uniform Act and refused to consider as conclusive the Florida decision upon which the petitioner relied. The court referred to several opinions which sustain this position.[11] It recognized that the opposing view also finds

[7]Act of September 24, 1789, c. 20, § 34; R. S. § 721; U. S. C. Tit. 28, § 725.

[8]*Bank of the United States* v. *Tyler*, 4 Pet. 366; *Bank of the United States* v. *Daniels*, 12 Pet. 32; *Paine* v. *Central Vermont Railroad Co.*, 118 U. S. 152, 160; *Moses* v. *Lawrence County Bank*, 149 U. S. 298; *Sowell* v. *Federal Reserve Bank*, 268 U. S. 449, 456; *Crittenden* v. *Widrevitz*, 272 Fed. 871; *Mack* v. *Dailey*, 3 F. (2d) 534, 538; *Queensboro Nat. Bank* v. *Kelly*, 48 F. (2d) 574.

[9]*Junction Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226; *Flash* v. *Conn*, 109 U. S. 371, 378; *Prentice* v. *Zane*, 19 Fed. Cas. 1270; *Phipps* v. *Harding*, 70 Fed. 468; *United Divers Supply Co.* v. *Commercial Credit Co.*, 289 Fed. 316; *Gutelius* v. *Stanbon*, 39 F. (2d) 621.

[10]*Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32; *Jones* v. *Prairie Oil & Gas Co.*, 273 U. S. 195, 199-200; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480.

[11]*Mutual Life Ins. Co.* v. *Lane*, 151 Fed. 276; *Capital City State Bank* v. *Swift*, 290 Fed. 505, 509; *Peterson* v. *Metropolitan Life Ins. Co.*, 19 F. (2d)

support in other decisions of the federal courts.[12] Because of this contrariety of opinion we granted the writ of certiorari.

We think the better view is that there is no valid distinction in this respect between an act which alters the common law and one which codifies or declares it. Both are within the letter of Section 34 of the Judiciary Act (*supra*). And a declaratory act is no less an expression of the legislative will because the rule it prescribes is the same as that announced in prior decisions of the courts of the state. Nor is there a difference in this respect between a statute prescribing rules of commercial law and one concerned with some other subject of narrower scope. The contention of the respondent that this court announced a contrary view in *Swift* v. *Tyson*, 16 Pet. 1, is not sustained by a careful reading of the opinion in that case.[13] We are referred to certain expressions found in *Watson* v. *Tarpley*, 18 How. 517, at page 521. What was there said on the subject was unnecessary to the decision, and has not been followed in later cases. The Florida Negotiable Instruments Law, as construed by the Supreme Court of the State, furnishes the rule of decision by which the negotiable character of the notes is to be determined.

3. The petitioner asserts that in *Taylor* v. *American National Bank of Pensacola*, 63 Fla. 631, the supreme court of that State construed the statute so as to make negotiable an instrument of the tenor of those in suit. The note involved in that case was payable two years after date with interest from date at the rate of eight per cent. per annum, interest payable quarter-annually, and was held to be negotiable, Section 2 of the Uniform Act being

74; *Jockmus* v. *Claussen & Knight*, 47 F. (2d) 766. In addition to the cases cited by the Circuit Court the following express like views: *Byrne* v. *Kansas City, Ft. S. & M. R. Co.*, 61 Fed. 605, 614; *Babbitt* v. *Read*, 236 Fed. 42, 49; *Manufacturers' Finance Corp.* v. *Van Neill Co.*, 62 F. (2d) 625, 628. Compare *American Mfg. Co.* v. *U. S. Shipping Board*, 7 F. (2d) 565, 566.

[12]The court cited *Savings Bank of Richmond* v. *National Bank of Goldsboro*, 3 F. (2d) 970 and *Niagara Fire Ins. Co.* v. *Raleigh Hardware Co.*, 62 F. (2d) 705. There are other cases in which the federal courts have held they must follow the state court's construction of the Uniform Negotiable Instruments Law. See: *Kobey* v. *Hoffman*, 229 Fed. 486, 488; *Crittenden* v. *Widreitz*, 272 Fed. 871; *Mack* v. *Dailey*, 3 F. (2d) 534, 538; *Gutelius* v. *Stanbon*, 39 F. (2d) 621; *Queensboro National Bank* v. *Kelly*, 48 F. (2d) 574. Compare *Bank of United States* v. *Cuthbertson*, 67 F. (2d) 182, 186.

[13]The language relied on is found at p. 18.

quoted. The decision is a clear authority that under the Act the provision for periodical payment of interest before the due date of the principal does not destroy negotiability. As the note did not provide for interest on deferred interest payments, either at the same or a different rate from that named as payable upon principal, the effect of such a stipulation was not decided. Upon this matter, therefore, the case cannot be said to be an authority by which the Circuit Court of Appeals was bound.

4. The absence of a decision by the Supreme Court of the State did not relieve the courts below from applying the Florida statute. Lacking such authoritative construction, their duty was to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to the same sections of the Negotiable Instruments Law.[14]

If, as is admitted, the court of last resort of the state, holds that provision for payment of interest in instalments prior to maturity of principal does not render the sum payable so uncertain as to destroy negotiability, we think an added stipulation that overdue interest shall bear interest at a named rate until paid would not call for a different decision. Courts which have had occasion to consider the effect of the Act upon instruments of like tenor, have uniformly pronounced them negotiable.[15] And cases decided prior to the adoption of the Act are to the same effect.[16] No contrary decision has been brought to our notice. Until the Supreme Court of Florida holds otherwise, we are justified in construing the Act in accordance with what we think its intent, especially as this construction accords with the views of the courts of other states.

5. The respondent urges that the notes are so ambiguous with respect to the rate of interest that they do not call for the payment of a sum certain, and must therefore be held not to be negotiable. *First National Bank of Miami* v. *Bosler*, 297 Pa. 353, is cited as sustaining this position. The note there under consideration stipulated for eight per cent. per annum upon the principal,

[14] *Wabash Valley Electric Co.* v. *Young*, 287 U. S. 488, 496; *Farmers' National Bank* v. *Sutton. Mfg. Co.*, 52 Fed. 191, 196; *Kobey* v. *Hoffman*, 229 Fed. 486, 488; *United Divers Supply Co.* v. *Commercial Credit Co.*, 289 Fed. 316, 319; *Gutelius* v. *Stanbon*, 39 F. (2d) 621.

[15] *Lister* v. *Donlan*, 85 Mont. 571; *National Bank* v. *Jefferson*, 51 S. Dak. 477; *Barker* v. *Sartori*, 66 Wash. 260.

[16] *Gilmore* v. *Hirst*, 56 Kan. 626; *Brown* v. *Vossen*, 112 Mo. App. 676.

"from date until fully paid. Interest payable semi-annually. . . . *Deferred payments* are to bear interest from maturity at ten per cent per annum semi-annually." The decision against negotiability rested upon the proposition that the two interest provisions were so inconsistent that one reading the note could not ascertain at which rate interest was payable on overdue principal. The decision has been criticized, *Lessen* v. *Lindsey*, 238 App. Div. (N. Y.) 262, on the ground that ambiguity alone does not destroy negotiability, but requires merely a construction of the instrument and a determination of which of two inconsistent clauses shall control. But, be this as it may, the notes in the present case are, we think, free from ambiguity. They provide for interest on the principal sum at the rate of seven per cent. per annum from date until fully paid, for interest payable semi-annually, and add that deferred *interest* payments shall bear interest from maturity at ten per cent. per annum, payable semi-annually. While, therefore, the principal is to bear interest at seven per cent, overdue interest is to be paid with interest at ten per cent. The word "maturity" seems obviously to refer to the due dates of interest and not to the date for payment of principal.

The judgment must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.